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No. (1)

In The
Supreme Court of the United States

STACEY STANTON; MICHAEL FRIAS; BRIAN LANG; JOHN SPEARMAN; TERRY CONNOR; WILLIAM A. ORDWAY; and LELA STEFFEY, Members of the Arizona License Plate Commission,

Petitioners,

vs.

ARIZONA LIFE COALITION; GARY PAISLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err in holding – in conflict with the Sixth Circuit – that specialty license plates constitute private speech, not government speech, and that the First Amendment therefore gave the Respondents the right to require Arizona to issue a license plate with a message that Arizona does not wish to convey?

PARTIES TO THE PROCEEDING

The Respondents are the Plaintiffs-Appellants: the Arizona Life Coalition and its Chairman, Gary Paisley. This Petition will refer to them collectively as "Life Coalition."

The Petitioners are the current members of the Arizona License Plate Commission: Stacey Stanton (Chair); Lela Steffey; William A. Ordway; Richard Fimbres; Roger Vanderpool; Margie Emmerman; and Dora Schriro. This Petition will refer to them collectively as "the Commission." (Fimbres, Vanderpool, Emmerman, and Schriro were not Defendants below, having replaced other members on the Commission after the Complaint was filed. The named Defendants who have been replaced and are no longer members are Michael Frias, Brian Lang, John Spearman, and Terry Connor.)

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The decision of the Ninth Circuit Court of Appeals is reported: *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008). It is included as Appendix A.

The decision of the district court is unreported: *Arizona Life Coalition, Inc. v. Stanton*, 2005 WL 2412811, No. CV-31691-Phx-PGR (D. Ariz. Sep. 26, 2005). It is included as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its panel decision on January 28, 2008. No rehearing was sought or ordered. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Respondents – Plaintiffs below – filed suit under 42 U.S.C. § 1983, alleging violations of their federal constitutional rights. The United States District Court for the District of Arizona had jurisdiction under 28 U.S.C. § 1341 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution is set forth in Appendix C.

Arizona Revised Statutes Annotated (A.R.S.) §§ 28-2404 and 28-2405 are also set forth in Appendix C.

STATEMENT OF THE CASE

The members of the Arizona License Plate Commission ask this Court to grant certiorari to settle a dispute among the federal courts about whether the States' specialty license plates constitute government speech. They seek review of the court of appeals' decision holding that the Commission violated the Respondents' free-speech rights by denying their application for a specialty Arizona license plate bearing their logo and their motto, "Choose Life." The Ninth Circuit held that the requested license plate constituted private speech, not government speech, and therefore that the First Amendment's Free Speech Clause was implicated. It went on to hold that the Commission violated the Respondents' free-speech rights in denying the requested plate.

A. Material Facts.

Arizona Life Coalition is an Arizona non-profit corporation whose membership includes both organizational and individual members; Gary Paisley is its

chairman. (Dkt. 35 at 2, ¶¶ 1, 2.) Life Coalition sued the members of the Arizona License Plate Commission, alleging that they violated its civil rights by failing to authorize the issuance of a special organization plate conveying the Coalition's message "Choose Life." (Dkt. 1; Dkt. 14 [Amended Complaint].)

1. Statutory Process for Special Organization License Plate Applications.

The process to request a special organization license plate is provided in A.R.S. §§ 28-2404 and -2405. (App. C.) Qualifying organizations may apply for special organization license plates by following the statutory procedure. A.R.S. § 28-2404(A). The Arizona Department of Transportation determines whether the applicant meets the statute's requirements. *Id.* The Commission determines whether to authorize a special organization plate. A.R.S. § 28-2404(B). The Commission is composed primarily of the directors (or their designees) of Arizona state agencies: the Department of Public Safety; the Department of Transportation; the Office of Tourism; and the Department of Corrections. A.R.S. § 28-2405(A).

Under A.R.S. § 28-2405(D), the Commission is to determine, inter alia, the color and design of license plates and whether the special organization plates meet the following requirements of A.R.S. § 28-2404(B):

> 1. The primary activity or interest of the organization serves the community, contributes to the welfare of others and is not

offensive or discriminatory in its purpose, nature, activity or name.

2. The name of the organization or any part of the organization's purpose does not promote any specific product or brand name that is provided for sale.

3. The purpose of the organization does not promote a specific religion, faith or anti-religious belief.

2. Life Coalition's Applications.

Life Coalition applied for a special organization plate displaying its logo – a graphic of two children's faces – and the motto, "Choose Life." (Dkt. 35 at 8, ¶ 22.) The Department of Transportation determined that Life Coalition was a qualified organization under A.R.S. § 28-2404(G)(2) and submitted its request to the Commission. (*Id.*, ¶ 23.)

The Commission first considered Life Coalition's application at its meeting on August 28, 2002. (*Id.* at 11, ¶ 32.) At that meeting, Commission members expressed concerns about the plate design, which did not have the required name of the organization. (*Id.*, ¶ 33.) Members also discussed whether a "Choose Life" plate would be perceived as being endorsed by the State of Arizona. (*Id.*, ¶ 36.) Several Commission members expressed reservations about Life Coalition's application. (*Id.*, ¶ 38.) Commissioners Steffey and Gutier were concerned that if the Commission approved a license plate with "Choose Life," then

groups with differing viewpoints might also apply for a license plate with the opposite position. (*Id.*) The Commission did not approve or disapprove Life Coalition's request at the meeting; it tabled the application pending receipt of additional information and legal advice. (*Id.* at 12, ¶ 39.)

Life Coalition later submitted a revised application. (*Id.*, ¶ 40.) The only material difference in this new application was that it included Life Coalition's name in the plate design. (*Id.*, ¶ 41.)

The Commission met and considered Life Coalition's renewed application. (*Id.* at 13, ¶ 44.) Paisley told the Commissioners that Life Coalition had added its name to the logo in response to the comments from the earlier meeting. (*Id.* at 15, ¶ 54.) After hearing from Paisley and after some further discussion, the Commission formally denied Life Coalition's request. (*Id.* at 17-18, ¶¶ 70-84.)

B. Course of Proceedings.

Life Coalition filed suit in the United States District Court for the District of Arizona against the Commission and its individual members, seeking injunctive and monetary relief. (Dkt. 1; Dkt. 14 [Amended Complaint].) (The parties later stipulated to dismiss the monetary claims. [Dkt. 22.]) Life Coalition alleged that the Commission violated its First Amendment and equal-protection rights by denying its application. (Dkt. 14.) The parties filed

Cross Motions for Summary Judgment based on agreed facts. (Dkt. 34, 35, 39, 45.)

The district court denied Life Coalition's Motion and granted the Commission's. (Dkt. 54 [App. B].) Applying the four-factors test that courts have developed, it held that Life Coalition's license plate would constitute government speech if it were issued. (App. B at 5b-13b.) It determined first that the overall purpose of the specialty license-plate program "serves primarily a government function." (*Id.* at 9b.) It then found that the Commission "exercises enough substantive control" to "make[] the speech government speech rather than private speech." (*Id.* at 11b.) Finally, it concluded that both Life Coalition and Arizona would be the literal speaker on the license plate but "the ultimate responsibility remains with Arizona, which controls the type of organization allowed and the substance that the organization tries to promote." (*Id.* at 13b.)

It also held that the plate constituted a nonpublic forum and that the Commission's decision to deny Life Coalition's application was reasonable. (*Id.* at 13b-17b.) It rejected Life Coalition's equal-protection argument. (*Id.* at 21b-22b.)

Applying the same four factors as the district court, the Ninth Circuit reversed. *Ariz. Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (App. A). Conceding that it was a close question, the court held that the license plate would constitute private – not government – speech, and thus would implicate Life

Coalition's free-speech rights. *Id.* at 968 (App. A at 14a-21a).

Acknowledging that "the primary purpose of any vehicle license plate is vehicle identification and registration" (*id.* at 15a), the court nonetheless concluded that the specialty license-plate program serves a private, rather than a government function (*id.* at 16a). It pointed to secondary purposes of the program: allowing philanthropic organizations to spread their message "in the hopes of raising money to support their cause." (*Id.*) The court next found that the Commission lacked editorial control over the messages conveyed on specialty plates. (*Id.* at 17a-18a.) And although it conceded that Arizona owns its license plates and that both the State and the car owner could be viewed as the literal speaker, the court found that the owner was the speaker because of the "logo depicting the faces of two young children will also be displayed on the license plate supporting the message 'Choose Life.'" (*Id.* at 20a.) Finally, the court concluded that Life Coalition, not the Commission, would bear the ultimate responsibility for the plate because Life Coalition suggested the content. (*Id.* at 20a-21a.)

The court therefore held that Life Coalition's requested plate constituted private, not government, speech. (*Id.* at 21a.) In so doing, it acknowledged that in *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir.), *cert. denied*, 126 S. Ct. 2972 (2006), the Sixth Circuit had reached the

opposite conclusion "on nearly identical facts." (App. A at 11a.)

The court went on to conclude that the Commission had violated Life Coalition's free-speech rights; it therefore reversed and remanded to the district court. (*Id.* at 34a.)[1]

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the conflict among the circuits concerning whether specialty license plates constitute government speech or private speech. In concluding that the message on Arizona's specialty license plates is private speech, the Ninth Circuit ruled consistently with *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles,* 288 F.3d 610, 619-22, *reh'g en banc denied,* 305 F.3d 241 (4th Cir. 2002), but in direct conflict with the Sixth Circuit in *Bredesen*, 441 F.3d at 375 (message on the face of Tennessee specialty license plates is government speech). Concluding that a message on specialty

[1] The court also held that the Tax Injunction Act did not deprive the federal courts of jurisdiction over Life Coalition's challenge. (App. A at 71.) In this, it agreed with the Sixth Circuit in *Bredesen*, 441 F.3d at 373, and disagreed with the Fifth Circuit's contrary holding in *Henderson v. Stalder,* 407 F.3d 351, 354-60 (5th Cir. 2005), *cert. denied sub nom., Keeler v. Stalder,* 126 S. Ct. 2967, No. 05-1222 (June 26, 2006). The Petitioners do not seek certiorari on this issue.

license plates is private speech ignores the fact that their quintessential purpose and nature is governmental – to identify automobiles and their owners and to show compliance with state registration laws – and that the very reason that organizations want their message on license plates is to receive the State's apparent endorsement of their message.

This Court's guidance is necessary to clarify the government-speech doctrine. The Court has recently granted certiorari in *Pleasant Grove City v. Summum*, No. 07-665, *cert. granted* (U.S. March 31, 2008). Like the Ninth Circuit here, the Tenth Circuit in *Summum* misapplied the government-speech doctrine in concluding that the First Amendment required the city to display a privately donated monument on city property. *Summum v. Pleasant Gove City*, 483 F.3d 1044, 1057, *reh'g & reh'g en banc denied*, 499 F.3d 1047 (10th Cir. 2007). These courts have unreasonably interpreted the First Amendment to limit the ability of government to determine what messages it will communicate.

Finally, certiorari is warranted because of the practical consequences of the circuit split. States in the Sixth Circuit may choose the message that they wish to promote and are assured that their citizens will not be confused by the mandatory display of messages that these States do not support. But States in the Ninth and Fourth Circuits are compelled to allow messages on their license plates that they do not support.

I. Federal Courts Have Reached Conflicting Decisions on Whether Specialty License Plates Constitute Government Speech.

The lower courts have reached inconsistent results on whether specialty license plates involve government speech. As one judge put it even before the Ninth Circuit issued its opinion here: "[A]t least three circuits (4th, 5th, and 6th) will have spoken on the issue, reaching at least three different conclusions, via at least sixteen separate opinions." *Bredesen*, 441 F.3d at 380 n.1 (Martin, J., concurring in part, dissenting in part). The Ninth Circuit opinion only exacerbates the conflict, and thus this Court's guidance is necessary.

The Ninth Circuit disagreed with the district court to hold that specialty license plates constitute private speech. *Ariz. Life Coalition*, 515 F.3d at 968 (App. A at 21a). It agreed with *Sons of Confederate Veterans*, 288 F.3d at 621, where a panel of the Fourth Circuit affirmed the district court, holding that specialty license plates constitute private speech. *See also Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003) (dictum: "We fail to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech."). But the Ninth Circuit's decision conflicts with *Bredesen*, 441 F.3d at 375, where the Sixth Circuit reversed the district court and held that a specialty license plate constitutes government speech. Taking yet a different approach, a different

panel of the Fourth Circuit, affirming the district court, concluded that specialty license plates are neither purely government speech nor private speech. *Planned Parenthood of S.C., Inc. v. Rose,* 361 F.3d 786, 793 (lead opinion of Michael, J.); *id.* at 800 (Luttig, J., concurring); *id.* at 801 (Gregory, J., concurring), *reh'g & reh'g en banc denied*, 373 F.3d 580 (4th Cir. 2004).

To determine whether public or private speech is involved, the lower courts have developed the so-called four-factor test, which the Ninth Circuit applied here. *Ariz. Life Coalition*, 515 F.3d at 964 (App. A at 12a); *see Rose,* 361 F.3d at 794; *Sons of Confederate Veterans*, 288 F.3d at 618; *Summum v. City of Ogden,* 297 F.3d 995, 1004 (10th Cir. 2002); *but see Bredesen*, 441 F.3d at 375, 380 (rejecting the four-factors test in favor of factors listed in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005)).

The test examines these four factors:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

Ariz. Life Coalition, 515 F.3d at 964 (App. A at 12a) (quoting *Sons of Confederate Veterans*, 288 F.3d at 618-19). The factors are supposed to be non-exclusive and non-exhaustive, and not all factors are necessarily applicable in each case. *Id.*; *Rose*, 361 F.3d at 794; *Sons of Confederate Veterans*, 288 F.3d at 618-19.

Because the four-factor test has not produced consistent results when applied to specialty license plates, this Court should grant certiorari to give the lower courts guidance on the appropriate test for determining when the government has the right to control its message on license plates.[2]

II. The Lower Courts Need This Court's Guidance on the Government-Speech Doctrine.

The Court should grant certiorari to clarify the proper scope and application of the government-speech doctrine to determine whether the States may, consistent with the First Amendment, decline to issue

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[2] This issue is real and concrete. There are more cases working their way through the courts that raise First Amendment concerns in the denial of plate applications, whether for specialty plates or vanity plates. They include at least the following: *Byrne v. Rutledge*, No. 07-4375, Second Circuit; *Roach v. Vincent*, No. 08-1429, Eighth Circuit; *Choose Life Ill. v. White*, No. 07-1349, Seventh Circuit; *Children First Foundation, Inc. v. Legreide*, No. CIV.A. 04-2137 (MLC), District of New Jersey; and *Children First Foundation, Inc. v. Martinez*, Civ. No. 1:04-CV-0927 (NPM/RFT), Northern District of New York.

specialty license plates containing messages that they do not wish to communicate.

When a State speaks, it "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). "[I]t may make content-based choices." *Id.* "The First Amendment does not prohibit the government itself from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression." *Muir v. Ala. Educ. Television Comm'n,* 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc). When the speech involved is government speech, the government has not created a forum for public speech and First Amendment free-speech protections do not apply. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000).

The lower courts' four-factors test for differentiating between private and government speech has led to inconsistent results. And the Ninth Circuit's attempt to tie its use of the four-factors test to this Court's analysis of the government-speech doctrine in *Johanns v. Livestock Marketing Ass'n,* 544 U.S. 550 (2005), is inappropriate. The Ninth Circuit stated that *Johanns* applied a test similar to the four-factors test. *Ariz. Life Coalition*, 515 F.3d at 965 (App. A at 14a) (citing *Johanns*, 544 U.S. at 560-61). *Johanns* analyzed whether a U.S. Department of Agriculture program requiring beef producers to

finance promotional messages ("Beef: It's What's for Dinner") to support their industry violated their free-speech rights. *Johanns*, 544 U.S. at 554. The Court rejected that claim, concluding that the program constituted government speech. *Id.* at 561-62. It listed various facts showing the ties between the USDA and the ads, *id.* at 560-62. But it did not purport to establish them as a test of general application.

The differences between specialty license plates and beef-industry ads counsel against applying the same test to both. Watching the beef ads, the typical television viewer would not have known that the Cattlemen's Beef Promotion and Research Board – which produced the ads, *Johanns*, 544 U.S. at 553 – was affiliated with the government. Certainly, the typical viewer had no way of knowing that "the government set[] the overall message to be communicated and approve[d] every word that [wa]s disseminated." *Ariz. Life Coalition,* 515 F.3d at 963 (App. A at 11a) (quoting *Johanns*, 544 U.S. at 561-62). The beef ads looked like any other commercial that a company or a trade group might have aired. Tacit, behind-the-scenes factors were all that connected the government to the ads in *Johanns*.

License plates stand in stark contrast; they are quintessentially governmental. They are clearly, unequivocally, and indelibly connected with the States that issue them, both by their essential nature and because the States' names are boldly featured on them. Consequently, their communicative connection

with the government does not depend on the factors that this Court noted in *Johanns*. And nothing in that opinion intimates that those factors – or any like them – are the sine qua non for government speech in different situations.

Courts attempting to differentiate between private and government speech in other contexts have reached questionable results. The Tenth Circuit believes that private monuments donated to and owned by governments, which the governments display on public property, constitute private speech. *Summum*, 483 F.3d at 1047. This Court granted the city's petition for certiorari on these questions:

> 1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?
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> . . . .
>
> 3. Did the Tenth Circuit err by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park?

Pleasant Grove City v. Summum, No. 07-665, Questions Presented (http://www.supremecourtus.gov/qp/07-00665qp.pdf, last visited April 11, 2008). In granting certiorari, this Court has recognized that the

lower courts need guidance on the government-speech issues presented. Similarly, the Court should grant certiorari here to give guidance on how the government-speech doctrine applies to specialty license plates.

III. The Ninth Circuit Erred in Concluding That Arizona's Specialty License Plates Constitute Private Speech.

The Ninth Circuit agreed that States should be allowed to control the message that they convey or are perceived as conveying: "We recognize that Arizona has a legitimate interest in regulating controversial material displayed publicly on government property." *Ariz. Life Coalition*, 515 F.3d at 973 (App. A at 34a). But it failed to give the State that legitimate control. Its failure to do so is directly related to its application of the four-factors test, which led it to conclude that the specialty license plate constitutes private speech. That conclusion skews the balance unreasonably against the government when elements of both government and private speech are present.

The four-factors test seems at least partially responsible for the Ninth Circuit's failure to perceive that the message on a license plate is inevitably and irretrievably associated with the government that issued the plate. Everybody knows that license plates are issued by the States. Every State has its name prominently displayed on its plates. Life Coalition's proposed plate is no exception: other than the Life

Coalition's logo and motto, the plate is identical to the standard Arizona license plate. (App. D.) The word "ARIZONA" is emblazoned across the top. (*Id.*) Persons seeing that plate could not help but conclude that the State of Arizona is urging them to choose life and thus is advocating for one side of the abortion debate. The Ninth Circuit's failure to recognize that fact shows that the four-factors test is ill-suited to specialty license plates.

Applying two of the four factors, the Ninth Circuit found it important that Life Coalition provided the text of the message for its requested plate and that the Arizona statutes did not explicitly give the Commission the power to reject the message. *Ariz. Life Coalition*, 515 F.3d at 966, 967-68 (App. A at 17a, 20a-21a). The problem with this is that these factors have little, if any, effect on the message that the license plate conveys to the typical viewer. These behind-the-scenes factors might have more relevance in the public-monument setting, where the government can erect a disclaimer stating that it does not endorse the message. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring) (acknowledging possibility of government disclaimer of religious symbol displayed on capitol grounds); *id.* at 784 (Souter, J., concurring) (same); *see also* Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. Davis Law Rev. 1317, 1339 (2004) (possibility of a governmental disclaimer should be a factor in determining whether

First Amendment protections apply). But disclaimers on license plates are impracticable, if not impossible.

The Ninth Circuit recognized that there was no evidence that Arizona intended to adopt the "Choose Life" message. *Ariz. Life Coalition*, 515 F.3d at 968 (App. A at 21a). But it turned that fact on its head, using it as a factor to conclude that that the plate constituted private speech, not government speech. *Id.* In so doing, it ignored the message that the proposed plate will actually communicate. That the State of Arizona does not necessarily endorse the "Choose Life" message is not conveyed to those who view the license plate. If the plate is issued, viewers will inevitably perceive that Arizona is advocating one side in the abortion debate.

Indeed, it cannot reasonably be doubted that this perception is precisely why Life Coalition is fighting so hard for this Arizona plate. As one judge has observed:

> The reason why an individual wants a vanity license plate is that the license plate bears the imprimatur of the state. Petitioner wants the state's endorsement of his message. Petitioner could put any bumper sticker on his vehicle that he desires. . . . However, . . . a bumper sticker would not satisfy petitioner's desire to have the state endorse the words he chooses to display.

Higgins v. Driver & Motor Vehicle Servs. Branch, 13 P.3d 531, 541 n.4 (Or. App. 2000) (en banc) (Wollheim,

J., concurring), *aff'd*, 72 P.3d 628 (Or. 2003). Whether or not the State actually shares the private speaker's sentiments, the medium involved – a state-issued license plate – conveys the message that the State does agree. States have a legitimate interest in ensuring that their own messages are clear and a corresponding interest in not being associated with messages that they do not wish to convey. The Ninth Circuit failed to sufficiently acknowledge this, a failing directly tied to its misapplication of the four-factors test.

One commentator has noted that specialty license plates blend government speech and private speech, arguing that in hybrid situations one party may not force the other to broadcast a message that the latter does not wish to be associated with. *Not for Attribution*, 37 U.C. Davis Law Rev. 1317. Governments have a legitimate interest in not having a private party's message associated with them. *Id.* at 1323-24 (citing *Wooley v. Maynard,* 430 U.S. 705, 717 (1977); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 827 (9th Cir. 1991)). The Fourth Circuit has recognized that specialty license plates are a hybrid of government and private speech. *Rose*, 361 F.3d at 793, 800, 801.

The hybrid approach is consistent with this Court's sentiments in *Wooley*, which held that a State may not constitutionally force car owners to "use their private property as a 'mobile billboard' for the State's ideological message" on the State's license plate. 430 U.S. at 714-15. The Ninth Circuit cited

Wooley in support of its conclusion that the license plate constitutes private speech. *Ariz. Life Coalition*, 515 F.3d at 966-67 (App. A at 18a-19a). But it misconstrued *Wooley*: this Court later clarified that the mobile billboard was the car, not the license plate. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 17 (1986). Just as governments cannot force individuals to spread a governmental message, the First Amendment should not give individuals the power to force the government to unwillingly spread individuals' messages. *See Not for Attribution*, 37 U.C. Davis Law Rev. at 1324 ("Government's negative expressive interests can be described as the flip side of the proposition that the First Amendment prohibits a government from compelling an individual to utter – or otherwise display or publicly associate with – a viewpoint with which he or she disagrees."). "[C]ourts have recognized that government may similarly have significant 'negative' interests in 'avoid[ing] becoming the courier' for views that are not its own." *Id.* (quoting *Wooley*, 430 U.S. at 717; citing *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d at 827 [school district properly excluded organization's advertisements from high school newspapers and other publications; school had an interest in "disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is"]).

At its core, the Free Speech Clause is aimed at prohibiting the government from silencing the citizens, preventing them from voicing their opinions.

E.g., *United States v. Eichman*, 496 U.S. 310, 316-17 (1990) (Flag Protection Act unconstitutionally infringed on free-speech rights of persons wishing to convey a message by burning the national flag). That did not happen here. Life Coalition had – and has – many ways to convey its message in the exact same time and place as a specialty license plate would have provided it. The only real difference is that a message on the license plate would have the imprimatur of the State of Arizona, and that only happens because the State's license plate communicates that imprimatur.

The Ninth Circuit's decision results in an extraordinary transformation of the First Amendment. It is no longer just a shield, protecting citizens against governmental efforts to stifle their messages. It is now a sword, giving citizens the power to force an unwilling government to convey their messages. The Court should grant certiorari to determine whether the First Amendment goes that far.

IV. The Court Should At Least Hold This Petition Pending the Outcome of *Pleasant Grove City v. Summum*.

The opinion that will come from *Pleasant Grove City v. Summum* could potentially resolve the most important issues of this case. It might therefore be appropriate to simply grant certiorari here and remand the Ninth Circuit to reconsider its opinion in light of the *Pleasant Grove City* opinion. Consequently, the Court should, at the very least, hold this

case until the opinion in *Pleasant Grove City* is issued.

CONCLUSION

The Court should grant this Petition for Certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARIZONA LIFE COALITION INC., an Arizona nonprofit corporation; GARY PAISLEY, an individual,

Plaintiffs-Appellants,

v.

STACEY STANTON, Arizona License Plate Commission Chair, in her personal capacity; MICHAEL FRIAS, Arizona License Plate Commission member, in his personal capacity; BRIAN LANG, Arizona License Plate Commission member, in his personal capacity; JOHN SPEARMAN, Arizona License Plate Commission member, in his personal capacity; JACKIE ALLGOOD, Arizona Motor Vehicle Division legislative liaison, in her personal capacity; TERRY CONNOR, individually and in his capacity as an Arizona License Plate Commission member; WILLIAM A. ORDWAY, in his official capacity as an Arizona License Plate Commission member; LELA STEFFEY, in her official capacity as an Arizona License Plate Commission member,

Defendants-Appellees.

No. 05-16971

D.C. No. CV-03-01691-PGR

OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
October 15, 2007 – San Francisco, California

Filed January 28, 2008

Before: David R. Thompson and Richard C. Tallman,
Circuit Judges, and Kevin Thomas Duffy,*
Senior United States District Judge.

Opinion by Judge Tallman

COUNSEL

Jeffrey A. Shafer (argued), Alliance Defense Fund, Washington, D.C.; Benjamin W. Bull, Alliance Defense Fund, Scottsdale, Arizona; Peter A. Gentala, The Center for Arizona Policy, Scottsdale, Arizona; Gary S. McCaleb, Alliance Defense Fund, Scottsdale, Arizona, for the plaintiffs-appellants.

Daniel P. Schaack (argued), Assistant Attorney General, Phoenix, Arizona; James R. Morrow, Assistant Attorney General, Liability Management Section, Phoenix, Arizona, for the defendants-appellees.

Denise M. Burke, Women's Choice Pregnancy Clinic, Chicago, Illinois, for the amicus curiae.

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* The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

OPINION

TALLMAN, Circuit Judge:

Arizona Life Coalition ("Life Coalition") appeals a summary judgment in favor of Stacey Stanton and other members of the Arizona License Plate Commission (collectively the "Commission"). Life Coalition contends that the Commission violated its First Amendment right to free speech and Fourteenth Amendment right to equal protection by arbitrarily denying its application for a special Arizona organization license plate that would portray its message "Choose Life." We agree that the Commission violated Life Coalition's First Amendment right to free speech and therefore do not reach its equal protection argument.

Messages conveyed through special organization plates – although possessing some characteristics of government speech – represent primarily private speech. Through its special organization license plate program, Arizona has created a limited public forum for all nonprofit organizations that meet the State's statutory requirements. Because the Commission denied Life Coalition's application on grounds not specified in the statute or related to the limited purpose of the license plate forum, we reverse the district court's grant of summary judgment in favor of the Commission.

I

The parties do not dispute the facts, and there is no material issue of fact to prevent summary judgment from being entered. Life Coalition is an Arizona nonprofit corporation that provides "compassionate care . . . to persons who are considering abortion, or who are affected by abortion." In June 2002, Life Coalition resubmitted an application for a speciality plate that would "display Life Coalition's official logo, a small graphic of two children's faces and the motto, 'Choose Life.'"[1] The Arizona Department of Transportation ("Department") certified that Life Coalition met the requirements of Arizona Revised Statute section 28-2404(G)(2)[2] and submitted Life Coalition's request for its special license plate to the Commission.[3]

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[1] Life Coalition had previously submitted an application in January 2002; however, that application was either not received by the Commission or lost.

[2] Arizona Revised Statute section 28-2404(G)(2) defines "organization" as

> an entity that is organized as a nonprofit corporation pursuant to title 10, chapters 24 through 40 and that either: (a) Certifies to the department that the organization has at least two hundred members[; or] (b) If the organization has fewer than two hundred members, agrees to pay the production and program costs of the special organization plate as determined by the commission.

(Footnote omitted).

[3] Arizona Revised Statute section 28-2404(A) provides that if the Department "determines the organization meets the

(Continued on following page)

Upon receiving a request, section 28-2404(B) provides that

> [t]he [C]ommission *shall* authorize a special organization plate if the organization meets the following requirements:
>
> (1) The primary activity or interest of the organization serves the community, contributes to the welfare of others and is not offensive or discriminatory in its purpose, nature, activity or name[;]
>
> (2) The name of the organization or any part of the organization's purpose does not promote any specific product or brand name that is provided for sale[;] and
>
> (3) The purpose of the organization does not promote a specific religion, faith or antireligious belief.

(Emphasis added).

The Commission first considered Life Coalition's application in August 2002. Members of the Commission raised concerns over whether the general public would believe Arizona had endorsed the message of the "Choose Life" license plate, as well as concerns over whether groups with differing viewpoints would

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requirements of an organization as defined in [section 28-2404(G)(2)], the [D]epartment shall submit the request for a special organization plate to the license plate commission."

file applications. To obtain legal advice, the Commission tabled Life Coalition's application without taking action.

To alleviate the Commission's concerns, Life Coalition filed a revised application on September 27, 2002. In this application Life Coalition proposed including its name on the plate design. The Commission considered Life Coalition's revised application in an August 2003 meeting. During the meeting, Gary Paisley, Chairman of Life Coalition, explained how Life Coalition served the community: (1) it organized a diaper drive, after which Life Coalition donated thousands of diapers to the Arizona Diaper Bank; (2) "Life Coalition's purpose is to provide compassionate services to those people that are considering or have been affected by abortion including pregnancy tests, pregnancy counseling, and relationship counseling"; and (3) Life Coalition "established a hotline for women who are pregnant." Paisley also told the Commission that Life Coalition's membership included approximately 40 organizations and 100,000 individuals. Paisley then confirmed that a person or organization must subscribe to Life Coalition's statement of principles to become a member.[4]

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[4] Life Coalition's members must adhere to its stated secular principles. For example, one of Life Coalition's principles is to "believe in the sanctity of every innocent human life, from conception to natural death, regardless of age, gender, disability, or degree of dependence."

Initially, the Commission declined to take action on Life Coalition's application. After Paisley implored the Commission to explain what statutory requirements Life Coalition failed to satisfy, a member of the Commission moved to formally deny the application, which passed by voice vote. Chairwoman Stanton replied to Paisley's request for an explanation by stating that "the action of the Commission is final" and that she did not believe "now is an opportunity for[ ] further debate, or for further info that [Life Coalition] could put on additional applications."

Life Coalition filed suit in the United States District Court for the District of Arizona on September 2, 2003. It filed its First Amended Verified Complaint on December 10, 2003. Pertinent to this appeal, Life Coalition moved for summary judgment on November 30, 2004, and the Commission cross-moved for summary judgment on January 1, 2005. The district court denied Life Coalition's motion for summary judgment, and granted the Commission's cross-motion for summary judgment. Life Coalition timely appealed. We reverse.

II

We review de novo a grant of summary judgment. *Balint v. Carson City,* 180 F.3d 1047, 1050 (9th Cir. 1999). The Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, imposes a jurisdictional limitation on federal courts. *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1176 (9th Cir. 1984), *overruled on other grounds as recognized*

by Arakaki v. Lingle, 477 F.3d 1048, 1062 (9th Cir. 2007). We are required to raise jurisdictional issues sua sponte, *id.,* and we note the TIA's application in the special organization plate context has been raised by our sister circuits. *Compare Am. Civil Liberties Union of Tenn. v. Bredesen,* 441 F.3d 370, 373 (6th Cir. 2006) (rejecting the argument that the TIA barred suit because the extra payments for special organization plates resemble "payments for simple purchases from the government" and are not taxes), *with Henderson v. Stalder,* 407 F.3d 351, 356 (5th Cir. 2005) (concluding that the additional charges for speciality plates are taxes because they "sustain[] the essential flow of revenue to the government," are "imposed by a state or municipal legislature," and are "designed to provide a benefit for the entire community"). Therefore, although neither party questions whether the TIA precludes jurisdiction in this case, we nonetheless address it here.

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. In Arizona, drivers must pay an additional twenty-five dollar fee to obtain a special organization plate. The issue is whether the money paid to obtain a special organization plate constitutes a tax to which the TIA would apply.

We find persuasive the Sixth Circuit's analysis in *Bredesen* and hold the extra fee is not a tax. The

transaction between a state's vehicle owner and the issuing authority is more akin to a contractual debt than a state imposed tax. Arizona has not coerced a sale attendant to the requirement that cars bear license plates to assist in identifying their owners, but has instead induced willing purchasers to agree to pay a certain extra sum of money in return for the right to bear a special message on an organizational license plate. *See Bredesen,* 441 F.3d at 374; *see also Women's Res. Network v. Gourley,* 305 F. Supp. 2d 1145, 1154 (E.D. Cal. 2004) ("[The additional payments are] voluntarily paid by a limited group of motorists who wish to both support a [special cause], and presumably desire to display that support on their license plate.").

The Sixth Circuit's reasoning is supported by our decision in *Bidart Brothers v. California Apple Commission,* 73 F.3d 925 (9th Cir. 1996). There, we recognized that the additional charge does not have to be characterized as a "tax" or a regulatory "fee." *Id.* at 933. In determining whether the TIA applies, the "ultimate question remains whether an assessment is a 'State tax.'" *Id.* Because the additional charges for a special organization plate are more akin to a contractual payment than a tax, we hold that the TIA does not apply to Life Coalition's suit. We therefore retain jurisdiction to hear its federal constitutional claim.

III

A

1

We must decide whether, by authorizing a specialty license plate sought by a nonprofit organization to display its message and the message of the organization's members, the State of Arizona has adopted that speech as its own. It is undeniable that "when the government speaks for itself, it 'may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.'" *Planned Parenthood of S.C. Inc. v. Rose,* 361 F.3d 786, 792 (4th Cir. 2004) (plurality) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995)); *see also Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles,* 288 F.3d 610, 616 (4th Cir.), *reh'g en banc denied,* 305 F.3d 241 (4th Cir. 2002) ("It is well established that 'the government can speak for itself.'") (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 229 (2000)). However, when the government regulates private speech, we must conduct a traditional First Amendment analysis. *Rose,* 361 F.3d at 792; *see also PMG Int'l Div., L.L.C., v. Rumsfeld,* 303 F.3d 1163, 1169 (9th Cir. 2002).

There is some question as to what standard we should apply in differentiating between private and government speech. In *Johanns v. Livestock Marketing Ass'n,* 544 U.S. 550 (2005), the Court addressed whether a federal program that requires

beef producers to finance promotional messages to support the beef industry – "Beef. It's What's for Dinner" – violated the First Amendment. *Id.* at 554. The Court held that "[w]hen . . . the government sets the overall message to be communicated and approves every word that is disseminated," it is government speech. *Id.* at 561-62. And, because "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government," "Congress . . . directed the implementation of a 'coordinated program' of promotion, 'including paid advertising, to advance the image and desirability of beef and beef products,'" and the Secretary of Agriculture "exercise[d] final approval authority over every word used in every promotional campaign," the beef promotional messages represented government speech. *Id.* at 560-61.

In *Bredesen,* 441 F.3d 370, the Sixth Circuit relied on *Johanns* to hold that the Tennessee statute authorizing a specialty license plate with a "Choose Life" logotype did not violate the First Amendment, despite the fact that the legislature refused to make available license plates with a "pro-choice" or "pro-abortion" message. *Id.* at 372. In doing so, the Sixth Circuit rejected – on nearly identical facts – the Fourth Circuit's reasoning in *Rose,* 361 F.3d 786, in part because the Fourth Circuit had relied on the "pre-*Johanns* four-factor test." *See Bredesen,* 441 F.3d at 380.

Prior to *Johanns,* the Fourth, Eighth, and Tenth circuits had adopted a nonexhaustive list of four

factors to differentiate between the two types of speech. Those factors are:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

Sons of Confederate Veterans, Inc., 288 F.3d at 618-19 (citing *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000)).[5]

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[5] Although we have not yet expressly adopted the four-factor test, we relied on similar factors in *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000). There, we addressed whether messages conveyed through school bulletin boards constituted government speech. *Id.* at 1011. We discussed various factors, including: (1) "who actually was responsible for the speech"; (2) who had access to the school bulletin boards; (3) who maintained editorial control over the bulletin boards; and (4) the purpose of the school bulletin boards. *Id.* at 1011-12. While recognizing that *Downs* cites similar factors, other circuits have declined to rely on its reasoning because of the special circumstances related to the school setting. *See Wells*, 288 F.3d at 1141 (stating that, "[d]ue to the 'special characteristics of the school environment,' [the court will] rely primarily on the four factors articulated in *Knights of the [Ku*

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As noted by Judge Martin in his dissenting opinion in *Bredesen, Johanns* is factually distinguishable from these specialty license plate cases. 441 F.3d at 385 (Martin, J., dissenting). *Johanns* involved a government-compelled subsidy of government speech. *Johanns,* 544 U.S. at 557. Specialty license plate programs do not raise issues regarding "compelled-speech" or a "compelled-subsidy." *See id.* (discussing the difference between "compelled-speech" cases and "compelled-subsidy" cases); *see generally Paramount Land Co. v. Cal. Pistachio Comm'n,* 491 F.3d 1003 (9th Cir. 2007) (applying *Johanns* in a compelled-speech case). In *Johanns,* the individual harm was "being forced to give the government money to pay for someone else's message." *Bredesen,* 441 F.3d at 385 (Martin, J., dissenting). In specialty license plate cases, private individuals choose to pay the price for obtaining a particular specialty license plate. The First Amendment harm "is being denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum." *Id.* at 386. Moreover, "specialty plate programs are not part of a larger governmental scheme to encourage some private activity, like beef consumption." Andy G. Olree, *Specialty License Plates: Look Who's Talking in the Sixth Circuit,* 68 Ala. Law. 213, 214 (May 2007). In light of these differences, Judge Martin believed that "[t]he government speech

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Klux Klan]" (citation omitted)); *Sons of Confederate Veterans, Inc.*, 288 F.3d at 619 n.7 (same).

doctrine, as it is used in *Johanns*" is inapplicable to specialty license plate cases such as this. *Bredesen*, 441 F.3d at 385.

Although we agree with Judge Martin in that *Johanns* is factually distinguishable, we believe that *Johanns* is instructive when determining whether the message constitutes government or private speech. In concluding that the beef program represented government speech, the Court relied on factors similar to those set forth in the four-factor test. It considered who controlled the speech, 544 U.S. at 560-61, the purpose of the program, *id.* at 561, and the fact that the Secretary of Agriculture exercised final editorial control over the promotional campaign, *id.* We therefore adopt the Fourth Circuit's four-factor test – supported by the Supreme Court's decision in *Johanns* – to determine whether messages conveyed through Arizona's special organization plate program constitute government or private speech.

2

i

The Commission argues that the "primary function of Arizona license plates – including special plates – is the State's need to identify a vehicle and its owner." It cites *Kahn v. Department of Motor Vehicles*, 16 Cal. App. 4th 159 (Cal. Ct. App. 1993), where the California Court of Appeal stated:

> A vehicle license plate is a state-imposed display of registered vehicle identification.

> That the state permits license holders, for an additional fee, to vary minimally their vehicle identification from the prescribed form by selecting letter and/or number combinations which may reflect an individual's personal or professional identity, or possibly express a thought or idea, is purely incidental to the primary function of vehicle identification.

Id. at 166. Life Coalition argues that the speciality license plates offer something more: "the opportunity to identify themselves with individualized messages via these specialized plates" as well as "the opportunity to benefit worthy organizations financially."

We agree with Life Coalition. While the primary purpose of any vehicle license plate is vehicle identification and registration, we are not concerned with the general validity of Arizona's licensing requirements. *Cf. Rose,* 361 F.3d at 793 (stating that the primary purpose of a South Carolina statute authorizing a specialty license plate with the words "Choose Life" was "to promote the State's preference for the pro-life position"); *Sons of Confederate Veterans, Inc.,* 288 F.3d at 619-20 (stating that the primary purpose of Virginia's special plate program is to collect revenue); *Choose Life Illinois, Inc. v. White,* 2007 WL 178455, *5 (N.D. Ill. Jan. 19, 2007) (concluding that the purpose of the Illinois specialty plate program is to "raise revenue for the state as well as to allow for some private expression"). Rather, we must address Arizona's *speciality license plate* program as a whole.

See Sons of Confederate Veterans, Inc., 288 F.3d at 619.

By allowing organizations to obtain speciality license plates with their logo and motto, Arizona is providing a forum in which philanthropic organizations, *see* Ariz. Rev. Code § 28-2404(B), can exercise their First Amendment rights in the hopes of raising money to support their cause. *See* Ariz. Rev. Code § 28-2402(1) (setting the fee for specialty license plates at twenty-five dollars); *id.* § 28-2404(F) (stating that eight dollars of the fee is a specialty plate administration fee and seventeen dollars is an annual donation to the organization). As in *Sons of Confederate Veterans, Inc.*, the fee structure for Arizona speciality plates suggests the program's revenue-producing aim. *See* 288 F.3d at 619. Before obtaining approval from the Department, the organization must certify that it either has 200 members or that it will agree to pay the production and program costs for the special organization plate. Ariz. Rev. Code § 28-2404(G)(2); *cf. Sons of Confederate Veterans, Inc.*, 288 F.3d at 620 ("The very structure of the program [– requiring 350 prepaid applicants –] ensures that only special plate messages popular enough among private individuals to produce a certain amount of revenue will be expressed.").

The revenue raising purpose of the Arizona special organization plate program supports a finding of private speech.

ii

The Commission's de minimis editorial control over the plate design and color does not support a finding that the *messages* conveyed by the organization constitute government speech. The Arizona legislature has chosen to limit the license plate forum to only those organizations that "serve[ ] the community, contribute[ ] to the welfare of others and [are] not offensive or discriminatory in [their] purpose, nature, activity or name." Ariz. Rev. Stat. § 28-2404(B). In addition, the organizations cannot "promote a specific religion, faith or antireligious belief." *Id.*

However, as Life Coalition notes in its brief, the statutory requirements address who may speak, not what they may say. For instance, in *Rose*, the "Choose Life" license plate "originated with the State, and the legislature determined that the plate will bear the message 'Choose Life.'" 361 F.3d at 793. Therefore, the state exercised control over the substantive content of the speech. *Cf. Sons of Confederate Veterans, Inc.*, 288 F.3d at 621 (noting that Virginia's license plate design criteria "do[ ] not contain guidelines regarding the substantive content of the plates or any indication of reasons, other than failure to comply with size and space restrictions"); *see also Johanns*, 544 U.S. at 561 (noting that the Secretary's role in the beef campaign extended beyond granting final approval or rejection; government officials "also attend[ed] and participat[ed] in the open meetings at which *proposals [we]re developed*" (emphasis added)).

In this case, the idea of a "Choose Life" license plate originated with Life Coalition. While the Commission determined whether Life Coalition met the statutory guidelines for gaining access to the license plate forum, Life Coalition determined the substantive content of their message. *Cf. Wells,* 257 F.3d at 1142 (concluding that this factor weighed in favor of government speech because "there [wa]s no indication that any of the [private speakers] even knew about the Happy Holidays sign, much less exercised any editorial control over its design or content"); *Choose Life Illinois,* 2007 WL 178455, at *6 (stating that this factor weighed in favor of private speech because "the idea and message of the Choose Life plate originated with a private organization, Choose Life Illinois, not the legislature").

Therefore, this factor weighs in favor of private speech.

iii

"[O]wnership of the means of communication [i]s a valid consideration in determining whether [the license plate] contained government speech." *Sons of Confederate Veterans, Inc.,* 288 F.3d at 621; *Wells,* 257 F.3d at 1142. Therefore, the fact that Arizona owns the special organization plates supports a finding that the State is the literal speaker. However, in *Wooley v. Maynard,* 430 U.S. 705 (1977), the Supreme Court indicated that messages conveyed through license plates "implicate private speech interests

because of the connection of any message on the plate to the driver or owner of the vehicle." *Sons of Confederate Veterans, Inc.*, 288 F.3d at 621 (discussing *Wooley*, 430 U.S. at 714-15); *see also Johanns*, 544 U.S. at 557 ("[In *Wooley*,] we held that requiring a New Hampshire couple to bear the State's motto, 'Live Free or Die,' on their cars' license plates was an impermissible compulsion of expression.").[6] Relying on *Wooley*, most courts that have addressed vanity plates have concluded the messages are private speech. *Sons of Confederate Veterans, Inc.*, 288 F.3d at 621 & n.9; *see also Rose*, 361 F.3d at 794 ("The literal speaker of the Choose Life message on the specialty plate therefore appears to be the vehicle owner, not

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[6] In a letter of supplemental authority filed after oral argument, the Commission directs us to the following statement from *Pacific Gas & Electric Co. v. Public Utilities Commission of Cal.*, 475 U.S. 1 (1986):

> In *Wooley v. Maynard*, we held that New Hampshire could not require two citizens to display a slogan on their license plates and thereby "use their private property as a 'mobile billboard' for the State's ideological message." The "private property" that was used to spread the unwelcome message was the automobile, not the license plate.

Id. at 17 (citation omitted). That statement does not undermine the sentiment, taken from *Wooley*, that license plate messages implicate private speech. *See Johanns*, 544 U.S. at 557. We have no doubt that New Hampshire's motto, "Live Free or Die," constitutes government speech. Nevertheless, it *still* implicated private speech interests because private individuals were being compelled to spread that message through the use of their vehicle. Here, however, the question is whether the message displayed on the license plate is itself private speech.

the State, just as the literal speaker of the bumper sticker message is the vehicle owner, not the producer of the bumper sticker."); *Perry v. McDonald,* 280 F.3d 159, 166 (2d Cir. 2001) (stating that a restriction on vanity plates "concern[ed] private individuals' speech on government-owned property"); *Lewis v. Wilson,* 253 F.3d 1077, 1079 (8th Cir. 2001) (characterizing a restriction on vanity plates as a restriction on private speech); *Choose Life Illinois,* 2007 WL 178455, *6 (concluding that a private individual is the literal speaker with specialty plates because they pay an extra fee to express a certain message).

This factor has characteristics of both private and government speech. Nevertheless, in this situation, where Life Coalition's logo depicting the faces of two young children will also be displayed on the license plate supporting the message "Choose Life," we conclude that it weighs in favor of finding this to be primarily private speech.

iv

The question of who bears "ultimate responsibility" for the "Choose Life" license plate is very similar to the question of who is the literal speaker. *See Rose,* 361 F.3d at 794; *Sons of Confederate Veterans, Inc.,* 288 F.3d at 621. "[P]rivate individual[s] choose[ ] to spend additional money to obtain the plate and to display its pro-life message[s] on [their] vehicle." *Rose,* 361 F.3d at 794. Here, Life Coalition submitted its motto to be placed on a speciality license plate

that would also identify the organization by name. Life Coalition controlled the message of its special organization plate, and the individual members who choose to purchase the plate voluntarily choose to disperse that message. *Cf. Johanns,* 544 U.S. at 561 (noting that Congress directed implementation of the promotional plan and that Congress and the Secretary determined what the promotional campaigns shall contain); *Rose,* 361 F.3d at 794 (finding that the drivers bore ultimate responsibility for the "Choose Life" license plate authorized by the State legislature).

It is true that, like the Secretary in *Johanns,* Arizona developed the program that allows nonprofit organizations such as Life Coalition to obtain specialty license plates. However, in *Johanns* the beef producers had no choice but to support the beef ad. In comparison, there is nothing in the record to even suggest that Arizona intended to adopt the message of each special organization plate as its own state speech. Instead, the burden is on the nonprofit organization. If it wants to convey a certain message through the Arizona specialty plate program, it must take the affirmative step of submitting an application. This suggests that it is Life Coalition, rather than the State of Arizona, that bears ultimate responsibility for the content of the speech.

We therefore hold that the "Choose Life" message displayed through a speciality license plate if issued by Arizona would constitute private speech.

B

1

Having determined that the "Choose Life" message would represent private speech, we must now determine whether the Commission has acted appropriately under the First Amendment. The first step in assessing a First Amendment claim relating to private speech on government property is to "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 965 (9th Cir. 2002) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund,* 473 U.S. 788, 797 (1985)). In defining the forum, we must focus "on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, [the Supreme Court's] cases have taken a more tailored approach to ascertain[ ] the perimeters of a forum within the confines of the government property." *Cornelius,* 473 U.S. at 801 (citation omitted). Here, the forum is Arizona license plates. *Cf. Lehman v. City of Shaker Heights,* 418 U.S. 298, 300 (1974) (treating the advertising spaces on city owned buses as the forum).

"[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of

certain subjects." *Cornelius*, 473 U.S. at 802. In a designated public forum, speakers cannot be excluded unless it is "necessary to serve a compelling state interest" and the exclusion is "narrowly drawn to achieve that interest." *Sammartano*, 303 F.3d at 965 (internal quotation marks omitted). We have further refined the concept of "designated" public forum by carving out a subcategory we call a "limited" public forum. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) ("[A] limited public forum is a sub-category of a designated public forum that 'refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.'" (alteration in original) (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999))). The government may restrict speech in limited public fora so long as the restrictions are "viewpoint neutral and reasonable in light of the purpose served by the forum." *Id.* at 1075 (internal quotation marks omitted).

The designated and limited public forum classifications "ha[ve] been the source of much confusion." *Id.* at 1074. A limited public forum exists when the government intentionally opens a nonpublic forum to expressive activity by a certain class of speakers to address a particular class of topics. *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003) (citing *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1080 (9th Cir. 1990) (finding a limited public forum when "California created the [voters'] pamphlets for the specific purpose of allowing a limited class of

speakers, the candidates, to address a particular class of topics, statements concerning the personal background qualifications of each candidate")).

We have no trouble concluding that Arizona's purpose was to open up its license plate forum to a certain class of organizations for expressive activity. *Cf. Faith Ctr. Church Evangelistic Ministries v. Glover,* 480 F.3d 891, 908 (9th Cir. 2007) (stating that the County intended to open its library meeting room to expressive activity when it allowed all "[n]on-profit and civic organizations, for-profit organizations, schools and governmental organizations" to use the meeting room for "meetings, programs, or activities of educational, cultural or community interest") (internal quotation marks omitted). As the Commission correctly notes in its brief, "[h]istorically, Arizona's license plates have served the purely governmental function of vehicle and vehicle owner identification and have been a nonpublic forum." However, Arizona took the affirmative step by passing its special license plate legislation of allowing limited access to license plates publicly displayed for expressive conduct as vehicles are driven throughout the state. *See Sons of Confederate Veterans, Inc. v. Holcomb,* 129 F. Supp. 2d 941, 948 (W.D. Va. 2001) (stating, in dicta, that "allowing groups to place various slogans and designs on license plates represents the Commonwealth's intentional action to open up a nontraditional forum for public discourse").

Arizona's speciality plate program encompasses a wide range of philanthropic organizations with community based programs/ideals. Section 28-2404(B) states that the Commission *shall* authorize a speciality license plate to all nonprofit organizations that (1) "serve[] the community, contribute[] to the welfare of others and [are] not offensive or discriminatory in [their] purpose, nature, activity or name"; (2) has an organizational name or purpose that "does not promote any specific product or brand name . . . provided for sale"; and (3) the organizations do not "promote a specific religion, faith, or antireligious belief."

Applying this statutory mandate, the Commission has authorized, and the Department has issued, the following special organization plates: (1) The University of Phoenix Alumni Network (bearing the University's identifier, "Univ. of Phoenix"); (2) Associated Fire Fighters of Arizona (bearing the Union's motto, "Professional Fire Fighters"); (3) Fraternal Order of Police (bearing the Order's identifier, "Fraternal Order of Police"); (4) Legion of Valor (bearing the Legion's identifier, "Legion of Valor"); and (5) Wildlife Conservation Council (bearing the Council's motto, "Conserving Wildlife").[7] In addition, the Commission has authorized six additional license plates, but at the time of briefing this appeal we were told

[7] The parties stipulated to this fact in filings before the district court. We do not know whether, since the inception of this appeal, the Commission has authorized the making of any other speciality license plates.

the Department had yet to issue them because of factors unrelated to this appeal: (1) Civil Air Patrol; (2) Arizona Association of Future Farmers of America; (3) Rotary International; (4) Arizona Hospice Palliative Care Organizations; (5) Red Means Stop Coalition; and (6) Arizona Historical Society.

Nevertheless, "[a] policy with a broad purpose . . . is not dispositive of an intent to create a public forum by designation." *Faith Ctr. Church Evangelistic Ministries,* 480 F.3d at 909. We must therefore look closely at the Commission's policy and practice to determine whether Arizona intended the speciality plate forum to be "open for indiscriminate use." *Id.* In other words, if Arizona intended only to open the forum to "certain groups or to certain topics," it has created only a limited public forum. *Cogswell,* 347 F.3d at 814 (internal quotation marks omitted). For instance, despite Contra Costa County's broad purpose in opening its library meeting room to public use, we held in *Faith Center Church Evangelistic Ministries* that the County created a limited public forum because the "County's policy excludes schools from using the meeting room 'for instructional purposes as a regular part of the curriculum' and organizations who wish to engage in 'religious services.'" 480 F.3d at 909. In addition, "the policy requires a potential user to submit an application describing the intended use and identifying the applicant," and the "application must be reviewed and approved in advance by the County." *Id.*

Similarly, Arizona by statute restricts its speciality license plate program to only nonprofit organizations with community driven purposes that do not promote a specific religion, faith or antireligious belief. Ariz. Rev. Stat. § 28-2404(B). To gain access, the nonprofit organization must have its application reviewed and approved by the Commission. *Cf. Cornelius,* 473 U.S. at 803; *Perry,* 280 F.3d at 168 (citing the fact that Vermont vehicle owners must obtain permission to receive vanity plates to support its finding of a nonpublic forum). These are not abstract policy statements, but are definite and unambiguous restrictions on gaining access to the forum. *See Hopper,* 241 F.3d at 1077 (citing *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.,* 148 F.3d 242 (3d Cir. 1998)).

From the record before us, it is also clear that the Commission has consistently applied the access restrictions when reviewing pending applications. *See Faith Ctr. Church Evangelistic Ministries,* 480 F.3d at 909 (citing *Hopper,* 241 F.3d at 1076 ("[C]onsistency in application is the hallmark of any policy designed to preserve the non-public status of a forum.")). In addition to Life Coalition's application, the Commission has denied two other applications for speciality license plates. The Commission unanimously denied International Dark Sky Society's application because its suggested "dark blue sky" motif would replace the standard Arizona license plate motif in violation of other statutory requirements. *See* Ariz. Rev. Stat. § 28-2403(a)(2). The Commission also denied an

application submitted by Embry-Riddle Aeronautical University, explaining that Arizona universities had to obtain legislative plates, whereas only alumni associations may obtain the special organization license plates. In comparison to the city in *Hopper,* through the License Plate Commission, Arizona has retained some substantive control over the content of its speciality license plate program. *See* 241 F.3d at 1078 (stating that the city failed to consistently enforce its "non-controversy" policy as it "neither pre-screened submitted works, nor exercised its asserted right to exclude works").

Finally, we note that the nature of the forum also supports a conclusion that Arizona intended only to create a limited public forum. *See Faith Center Church Evangelical Ministries,* 480 F.3d at 910. As the Second Circuit noted in *Perry,* the primary purpose in issuing license plates in general is to aid in vehicle identification. 280 F.3d at 167. However, one of the primary purposes in issuing vanity license plates (and, in turn, special organization plates) is to raise revenue. *Id.* Nevertheless, given the general overarching purpose of aiding in vehicle identification, expression through vanity plates (and, in turn, special organization plates) is subject to numerous restrictions with the general public having only limited access. *Id.* We therefore conclude that Arizona's speciality license plate program is a limited public forum, and that any access restriction must be viewpoint neutral and reasonable in light of the purpose served by the forum. *See Faith Center*

Church Evangelical Ministries, 480 F.3d at 910 (citing *Cornelius,* 473 U.S. at 806).

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The distinction between viewpoint discrimination and content-based discrimination is not precise. *Rosenberger,* 515 U.S. at 831. The Commission contends that it did not engage in viewpoint discrimination because it "did not grant a special organization plate to a group with a viewpoint in opposition to Life Coalition's" and therefore, "[n]either side of the 'Choose Life' issue is represented by a special organization plate." The Supreme Court rejected a similar argument in *Rosenberger,* where it found a First Amendment violation when a public university withheld funding to a student publication because its paper "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 823 (internal citations omitted; alterations in original). The dissent argued that the University did not engage in viewpoint discrimination because it limited all religious speech, both theistic and atheistic. *Id.* at 831. The majority rejected this argument, stating

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious

> speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic or social viewpoint.

Id.

Unlike the University system in *Rosenberger,* the Arizona statutes do not expressly prohibit abortion-related speech in the license plate forum. *Cf. id.* (stating that the Guidelines prohibit religious activity). Rather, the State has opened this forum to all organizations that serve the community and contribute to the welfare of others in a nondiscriminatory way. Ariz. Rev. Stat. § 28-2404(B)(1). The Commission does not argue that Life Coalition failed to meet this statutory requirement. Instead, the only justification the Commission can give for denying Life Coalition's application is that it chose not to enter the Choose Life/Pro-Choice debate. And "where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter." *Sammartano,* 303 F.3d at 971; *see also Choose Life Illinois, Inc.,* 2007 WL 178455, *8 (stating in dicta that the denial of an

application for a "Choose Life" license plate because it is "controversial" amounts to viewpoint discrimination).

Moreover, during the August 2002 hearing, the Commissioners expressed concerns that, if they granted Life Coalition's application, groups with opposing viewpoints would file applications for their own special organization plate. Preventing Life Coalition from expressing its viewpoint out of a fear that other groups would express opposing views seems to be a clear form of viewpoint discrimination. As we previously stated in *Hopper,* "[a] ban on 'controversial [speech]' may all too easily lend itself to viewpoint discrimination." 241 F.3d at 1079. Restrictions based on community standards of decency must be based on "objective criteria set out in advance." *Id.* at 1080.

Admittedly, this is a difficult issue. "The line between an acceptable subject matter limitation and unconstitutional viewpoint discrimination is not a bright one." *Cogswell,* 347 F.3d at 815. One thing is clear, "once the government has chosen to permit discussion of certain subject matters, it may not then silence speakers who address those subject matters from a particular perspective." *Id.*

Arizona has created a limited public forum for nonprofit organizations. The only substantive restriction is that the license plate cannot promote a specific product for sale, or a specific religion, faith, or anti-religious belief. Nowhere does the statute create

objective criteria for limiting "controversial" material, and nowhere does the statute prohibit speech related to abortion. *Cf. Cogswell*, 347 F.3d at 815 (finding restriction prohibiting candidates from discussing their opponents' views viewpoint neutral because the limited public forum was limited to candidate self-discussion and the submitted material included subject matter not included in the limited public forum). Consequently, because abortion-related speech falls within the boundaries of Arizona's limited public forum, and because the Commission clearly denied the application based on the nature of the message, we conclude the Commission's actions were viewpoint discriminatory.

ii

We also hold that the Commission acted unreasonably by denying Life Coalition's application for reasons not statutorily based or related to the purpose of the limited public forum. "The reasonableness of a governmental restriction limiting access to a nonpublic forum must be assessed 'in light of the purpose of the forum and all of the surrounding circumstances.'" *Id.* at 817 (quoting *Cornelius*, 473 U.S. at 789). "The reasonableness analysis emphasizes the consistency of the limitation in the context of the forum's intended purpose." *Id.*

The Commission, in fulfilling the legislature's intent to allow nonprofit organizations a means to promote their community-based cause to the public in

the hopes of raising awareness and revenue, regulates access to the forum to preserve its community-based function and protect the primary function of license plates: to aid in vehicle identification. The Commission does not dispute that Life Coalition has met each of the statutory requirements. It is an organization that benefits the community without promoting the sale of a product or any religious, faith, or antireligious belief. Nor does the Commission contend that Life Coalition's special organization plate will interfere with vehicle identification. In other words, it fits within the program's purpose. When an organization meets the requirements, the statute provides that "[t]he [C]ommission *shall* authorize a special organization plate." Ariz. Rev. Stat. § 28-2404(B) (emphasis added). By denying Life Coalition's application, although the organization and its message complied with the limited public forum's purpose as it is currently defined under Arizona law, the Commission ignored its statutory mandate and acted unreasonably in violation of the First Amendment to the United States Constitution.[8]

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[8] Given our holding, we will not address Life Coalition's claim that the Commission also violated its equal protection rights under the Fourteenth Amendment, or that section 28-2404 is unconstitutionally vague. *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 797 n.15 (9th Cir. 2006) (declining to address equal protection arguments after finding the ordinance violated the First Amendment); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 571 n.11 (9th Cir. 1984) (same).

IV

We recognize that Arizona has a legitimate interest in regulating controversial material displayed publicly on government property. Nevertheless, we are mindful of potential constitutional problems when government officials are given unbridled discretion in regulating speech, even in limited public fora. Arizona has defined the outer limits of its speciality license plate program, and Life Coalition fits within those statutory boundaries. Because the Commission denied Life Coalition's application on a ground not expressly related to the forum's purpose by discriminating on the basis of the viewpoint contained in its proposed message, we conclude that the Commission acted in violation of the First Amendment. We therefore reverse the district court's grant of summary judgment in favor of the Commission. The cause is remanded for entry of judgment in favor of Arizona Life Coalition on its First Amendment claim and such further proceedings as are necessary to ensure that its specialty license plate application is approved by the Arizona License Plate Commission.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizona Life Coalition, Inc., et al., Plaintiffs, vs. Stacey Stanton, et al., Defendants	No. CV-03-1691-PHX-PGR OPINION and ORDER

Pending before the Court is the Amended Motion for Summary Judgment (doc. #39) brought by plaintiffs Arizona Life Coalition, Inc. and Gary Paisley (collectively "Plaintiffs" or "Life Coalition") and the Cross-Motion for Summary Judgment (doc. #45) brought by Defendants Arizona License Plate Commission and Stacey Stanton (collectively "Defendants"). Having considered the parties' memoranda in light of their Stipulated Facts and the oral argument of their counsel, the Court finds that there are no genuine issues of material fact and that the defendants are entitled to entry of judgment in their favor as a matter of law pursuant to Fed.R.Civ.P. 56.

BACKGROUND

In January 2002, Life Coalition mailed a request for a special organization license plate to the Arizona Department of Motor Vehicles ("Department"). The

January 2002 request was lost and Life Coalition resubmitted an application in June 2002. Life Coalition requested a plate displaying its official logo, characterized by the faces of two children and the motto, "Choose Life." The Department determined that Life Coalition met the requirements prescribed by A.R.S. § 28-2404(G)(2) and submitted the request to the Arizona License Plate Commission ("Commission"). The purpose of Life Coalition is to provide charitable, educational, and scientific services to persons who are considering abortion. Life Coalition does not offer specific products or brand names for sale. The organization does not promote a specific religion, faith, or anti-religious belief.

On August 28, 2002, the Commission took up consideration of Life Coalition's application. The Commission discussed whether a "Choose Life" plate would constitute an endorsement by the State of Arizona. Specifically, the Commission was concerned that other groups, with differing abortion-related viewpoints, would also apply for a license plate. The Commission tabled the application pending further review. Life Coalition submitted a revised application to the Department in September 2002. The application's only substantive difference was the inclusion of the Life Coalition name on the plate design.

On August 28, 2003, the Commission met again to consider Life Coalition's application. Gary Paisley ("Paisley"), the Chairman of Life Coalition, represented Life Coalition before the Commission and was

asked a series of questions. Those questions are as follows:

> 1. Mr. Paisley was asked to elaborate on how the activities of Life Coalition serve the community and contribute to the welfare of others. Mr. Paisley responded by mentioning a diaper drive organized by Life Coalition and providing services to those considering abortion, including pregnancy tests, counseling, and relationship advice.
>
> 2. Mr. Paisley was asked to provide a list of organizations which are members of Life Coalition. Mr. Paisley stated that some 40 non-profit organizations were members of Life Coalition. When asked how many individual members Life Coalition had, Mr. Paisley stated that there were 100,000 individual members if one took into account the various organizational memberships.
>
> 3. Mr. Paisley was asked whether there were any restrictions on membership. Mr. Paisley stated that Life Coalition had a statement of principles and that members of Life Coalition must agree with the statement of principles and affirm their agreement with the statement through the execution of an application form.

Although initially stating during the August 28th meeting that it was not going to take any action on Plaintiffs' application, the Commission later formally voted to deny the application. In response to Mr. Paisley's questions as to how he could correct the

application to resolve any statutory deficiencies in it, the Commission's chairwoman stated that the Commission's denial of the application was final and that there would not be an opportunity for another amended application.

Plaintiffs thereafter commenced this action pursuant to 42 U.S.C. § 1983.

LEGAL ANALYSIS AND DISCUSSION

A. Propriety of Summary Judgment

The parties, having provided the Court with a set of Stipulated Facts (doc. #35), have agreed that this matter may be decided as a matter of law based on their cross-motions for summary judgment.

B. The First Amendment: Speech, Forum Analysis and Viewpoint Discrimination

Plaintiffs argue that special organization plates are private speech protected by the First Amendment, and that in denying their petition for a special organization plate, Defendants wielded unbridled discretion by employing vague standards to regulate otherwise protected speech and thereby engaged in viewpoint discrimination. Plaintiffs request that this Court grant summary judgment in their favor. Defendants argue, however, that the primary purpose of any license plate is "to identify vehicles and vehicle owners," thereby making speech on license plates government speech, and that the Commission's

actions were reasonable in light of the purpose served by this nonpublic forum and are viewpoint neutral. Defendants therefore ask this Court to deny Plaintiffs' amended motion for summary judgment and grant their cross-motion for summary judgment.

The First Amendment question before the Court is whether Defendants engaged in impermissible viewpoint discrimination against the Plaintiffs. This question, however, depends on whether the relevant message is either government or private speech. *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004), *cert. denied*, 125 S.Ct. 1036 (2005). This inquiry is generally dispositive in viewpoint discrimination cases based on three common assumptions: "first, that all speech is either government speech or private speech; second, that when the government speaks for itself and is not regulating the speech of others, it may discriminate based on viewpoint; and third, that the government may not discriminate based on viewpoint when it regulates private speech." *Id.*

1. Whether All the Speech is Either Government Speech or Private Speech

While the United States Supreme Court and the Ninth Circuit Court of Appeals have not yet addressed the issue on whether speech involving specialty license plates is government or private in nature, the Fourth Circuit Court of Appeals has addressed this particular issue. In *Sons of Confederate Veterans, Inc. v.*

Comm'r of Virginia Dep't of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002), the Sons of Confederate Veterans ("SCV") applied for a specialty license plate on behalf of its members. While the state of Virginia granted an organizational plate to members of the SCV, it refused to allow the SCV to display its emblem on the plate because it included the Confederate Flag. The Fourth Circuit concluded that the restriction, though neutral on its face, was discriminatory because it suppressed the SCV's viewpoint. *Id.* at 623-626.

In deciding whether the affected speech was government or private, the Fourth Circuit applied a four-factor test borrowed from other sister circuits. The test involves the examination of: "(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech[.]" *SCV*, 288 F.3d at 618 (internal quotation marks omitted); *see Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10th Cir.), *cert. denied*, 534 U.S. 997 (2001); *Knights of the Ku Klux Klan v. Curators of the Univ. of Missouri.*, 203 F.3d 1085 (8th Cir. 2000), *cert. denied*, 531 U.S. 814 (2000); *see also Downs v. L.A. Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001).

Applying the first factor of this four-factor test, the Court must consider the "purpose" of the special

plate program. The Plaintiffs argue that Arizona requires the guaranteed collection of fees designated for the plate's design and manufacture before the speech can be triggered. In other words, the program ensures that only special plate messages will appear if the messages are popular among private organizations whose membership is large enough to produce a certain amount of revenue. Defendants argue, however, that "the primary function of Arizona license plates . . . [is] the State's ability to identify a vehicle and a vehicle owner." There is merit to the Defendants' argument. The display of license plates has been deemed the best method of government identification, both for the vehicle and for the owner/operator of the vehicle. *See Kahn v. Dep't of Motor Vehicles*, 16 Cal.App.4th 159, 166 (1993) ("A vehicle license plate is a state-imposed display of registered vehicle identification. That the state permits license holders, for an additional fee, to vary minimally their vehicle identification from the prescribed form by selecting letter and/or number combinations which may reflect an individual's personal or professional identity, or possibly express a thought or idea, is purely incidental to the primary function of vehicle identification.").

The Plaintiffs' argument, however, has merit as well. Under A.R.S. § 28-2404(G)(2), organizations only qualify for a special organization plate if they certify "to the department that the organization has at least . . . [200] members" or otherwise agree "to pay the production and program costs of the special organization plate as determined by the commission."

Furthermore, A.R.S. § 28-2404(C) requires that qualified organizations "collect and hold applications from its members and the required fees for the special organization plates." The statute provides that the Department "shall design and issue the requested special plate within one year after receiving the applications and fees if the . . . [D]epartment determines that both of the following apply: (a) The applicants are qualified for the requested special plate. (b) The monies paid for the plates are available to the state." A.R.S. § 28-2404(C)(5). While Arizona's central purpose relating to license plates is the identification of a vehicle and a vehicle's owner, the purpose of the special plate program also appears to be one that "produce[s] revenue while allowing, on special plates authorized for private organizations, . . . the private expression of various views." *SCV*, 288 F.3d at 619. This is evidenced by the Commission's acceptance of such messages as "Conserving Wildlife", Rotary International's "Service Above Self", and Red Means Stop Coalition's "Stop Red Light Running". While all of these slogans seek to advance a view that may be good for public policy, all of these slogans, subject to a certain fee rate, have some indicia of private expression.

The special plate program works, however, "by authorizing a variety of state-approved, if not state-created, messages . . . allowing . . . private person[s] to decide whether to select a plate expressing a particular one." *SCV*, 288 F.3d at 620. Arizona determines the efficacy of license plate messages on the

basis of standards that avoid otherwise offensive speech, requiring a certain number of members and a certain fee that must be made available to the state for the design and issuance of the plates. *See* A.R.S. § 28-2404(G)(2); A.R.S. § 28-2404(C). Thus, the program's purpose, while having some measure of private expression, serves primarily a government function.

The second factor the Court must consider is the "degree of editorial control exercised by the government or private entities over the content of the speech." Arizona exercises a substantial amount of editorial control. The Plaintiffs claim that the Commission issued "instructions for ensuring that the design submitted by the sponsor [would] . . . conform to size and space requirements, but [did] not contain [any] guidelines regarding the substantive content of the [plate] or any indication of reasons, other than failure to comply with size and space restrictions." *SCV*, 288 F.3d at 621. This argument, however, has little merit. While the Commission determines "the color and design of license plates and whether to authorize special organization plates pursuant to § 28-2404," the Commission has also set out specific requirements regarding the organization's substantive purposes as evidenced in A.R.S. § 28-2404(B). *See* A.R.S. 28-2405(D).

Under A.R.S. § 28-2404(B),

> [t]he commission shall authorize a special organization plate if the organization meets the following requirements:
>
> 1. The primary activity or interest of the organization serves the community, contributes to the welfare of others and is not offensive or discriminatory in its purpose, nature, activity or name.
>
> 2. The name of the organization or any party [sic] of the organization's purpose does not promote any specific product or brand name that is provided for sale.
>
> 3. The purpose of the organization does not promote a specific religion, faith, or anti-religious belief.

All of these statutory guidelines represent a level of editorial control over the substantive nature of special organization plates, and they allow for broad discretionary power exercised by the Commission.

The Plaintiffs argue, however, that guidelines are restricted to general matters of design and do not address the substantive content of the plates in the required forms. While this argument comports with the reasoning in *SCV*, this is not the case here. The forms ask for general information such as name, address, and purpose of the organization. The forms also provide a template for a "[d]rawing or sample of the logo/indicia and organization name or slogan that . . . [the organization] wish[es] to appear on the

plate." Although such guidelines do not specifically address or use terms relating to the license plates, the statute most certainly relates to the substantive content of the plates since the statute discusses, in detail, the appropriate substantive purposes of the organizations themselves. Obviously, to hold otherwise would strip away any meaning to the phrase "special organization plate." Only special organizations will be allowed to display their messages on license plates if they meet the required substantive purposes as laid out in A.R.S. § 28-2404(B). Thus, Arizona exercises enough substantive control that makes the speech government speech rather than private speech.

Finally, the Court must determine the identity of the "literal speaker" and whether the government or private entity bears the ultimate responsibility for the content of the speech. The "literal speaker" may be the license plate itself, which would not implicate government or private speech directly. *See SCV*, 288 F.3d at 621. Arizona has an interest in identifying vehicles and vehicle owners. Special organizations, for a fee, can advance positions through messages on their license plates. The parties dispute who owns Arizona license plates. While Plaintiffs cite to A.R.S. § 28-2356 (transfer of license plates to another vehicle) and § 28-2403 (transfers of special plates) as proof that drivers, not Arizona, own their license plates, Defendants argue that since license plates are a state's best method "to identify a vehicle and a

vehicle owner," an automobile license plate is and remains a state communication for a state purpose.

Under A.R.S. § 28-2351(A), "[t]he department shall provide to every owner one license plate for each vehicle registered." The license plate commission determines "the color and design of the license plate." A.R.S. § 28-2351(C). On termination of the use of the license plate, "the director may *require* return to the department of the plate issued by the department." A.R.S. § 28-2352 (emphasis added). Clearly, Arizona is the owner of state-created, state-issued license plates. While one may transfer license plates to a new car or replace a standard license plate with a special plate, Arizona's ownership remains the same.

The special organization plates, however, "are mounted on vehicles owned by private persons." *SCV*, 288 F.3d at 621. The United States Supreme Court has indicated that license plates, even when owned by the government, implicate some private speech because of the connection of any message on the plate to the driver or owner of a vehicle. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (Supreme Court found that New Hampshire violated the First Amendment when the state required objecting drivers to display the state motto "Live Free or Die" on their license plate). Defendants' argument is more persuasive due to the nonpublic nature of license plates and the Arizona's imposition of limits on access to that forum. Pursuant to Arizona statute, the statutory scheme sets forth various requirements that organizations must meet in order to have a

special organization plate. Organizations must be a certain size and the Commission makes determinations as to the substantive purposes, and ultimately, the substantive content of the plates. *See* A.R.S. § 28-2404(G)(2); A.R.S. § 2402(B). In the end, Arizona bears the ultimate responsibility for the speech in this case. Thus, while the "literal speaker", *i.e.* the license plate, implicates both government and private speech, the ultimate responsibility remains with Arizona, which controls the type of organization allowed and the substance that the organization tries to promote.

2. Whether License Plates Constitute a Designated Public Forum or Nonpublic Forum

Plaintiffs further argue that special organization plates are a designated public forum because they serve as channels of communication designated by the Arizona legislature for use by certain speakers, or for the discussion of certain subjects. Defendants claim, however, that "[i]t is unreasonable to assume that Arizona license plates, which have served a purely governmental function and which have been a nonpublic forum, have automatically become a public forum because of legislation granting organizations the opportunity to apply for a special organization plate." In order to determine whether a state has unconstitutionally excluded a private speaker from a public forum, the Court must first decide on the nature of the forum. *See Perry Ed. Assn. v. Perry*

Local Educators' Assn., 460 U.S. 37, 44 (1983). The United States Supreme Court has identified three types of property: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

Traditional public fora are places devoted to assembly and public debate, such as public streets and parks. *Perry*, 460 U.S. at 45. The facts in this case, however, do not indicate a traditional public forum. License plates, both historically and presently, do not serve as forums that one would associate with assembly or public debate. Thus, the strict scrutiny analysis does not apply. The discussion must turn on whether license plates are public forums by government designation or nonpublic forums.

A public forum may be designated by the government for assembly and speech, for use by particular speakers, or for the discussion of particular topics. *Cornelius*, 473 U.S. at 802. Speakers in designated public fora "can be excluded . . . only when the exclusion is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that interest." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002). Courts often must look "to the policy and practice of the government, the nature of the property and its compatibility with expressive activity, and whether the forum was designed and dedicated to expressive activities. . . ." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998). Government exclusion of a speaker who falls

within a class to which a designated public forum is generally available is subject to critical review. *United States v. Kokinda*, 497 U.S. 720, 726-727 (1990). Other government property constitutes either a nonpublic fora or no fora at all. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

The First Amendment does not guarantee access to property simply because it is owned by the government. *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981); *accord United States v. Grace*, 461 U.S. 171, 177 (1983) ("The government, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated."). The case law indicates a distinction between *general access*, or public forums designated by the government, and *selective access*, or nonpublic forums. *Forbes*, 523 U.S. at 679. On the one hand, the government creates a designated public forum when it makes its property available to a certain class of speakers. *Id.* The government, however, must do so intentionally, permitting limited discourse in an otherwise nontraditional forum. *Cornelius*, 473 U.S. at 802. The Supreme Court has said consistently that it will not find a public forum if evidence exists of a contrary intent, nor will the Supreme Court infer government intent to create a public forum when the nature of the property is inconsistent with the expressive activity. *Id.* at 803.

On the other hand, the government does not create a public forum by designation "when it does no more than reserve eligibility for access to . . . [a] forum [for] . . . a particular class of speakers, whose members must then, as individuals, 'obtain permission.'" *Forbes*, 523 U.S. at 679. Control over access to a nonpublic forum can be based on subject matter and speaker identity if such distinctions are reasonable and viewpoint neutral. *Cornelius*, 473 U.S. at 806. A person may be excluded from a nonpublic forum if the topic he seeks to address falls outside the purpose of the forum or if he is not a member of the class of speakers for whom the forum has been created. *Id.* The government violates the First Amendment by denying access to a speaker for the sole purpose of espousing a point of view on an otherwise includible subject. *Id.*

Restricting access to a nonpublic forum, however, need only be reasonable; it need not be the most reasonable or only reasonable limitation. *Id.* at 808. The First Amendment does not require that a speaker be given unrestricted access to a nonpublic forum if the forum's use merely serves as the speaker's most efficient means of delivering his message. *Id.* at 809. Thus, "a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated" by the First Amendment. *Id.* at 808.

A special organization plate in Arizona is a nonpublic forum. First, a special organization plate is a limited type of license plate that must meet various

requirements to obtain permission from the State as to certain kinds of discourse. Second, access is selective as opposed to general. Organizations must be at least 200 people. They must serve the community in a nondiscriminatory fashion that neither promotes a specific brand or product or specific religion, faith, or antireligious belief. Third, Arizona did not intend to open special organization plates to every organization imaginable. While Arizona intentionally passed laws to allow some discourse on certain types of license plates, it did so for organizations with at least 200 members and who had met specific requirements. That is why the license plate is designated as a "special" organization plate.

3. Whether the Defendants Engaged in Impermissible Viewpoint Discrimination

Plaintiffs argue that Defendants' decision not to grant the Plaintiffs' application for a special organization plate was both unreasonable in light of the purpose served by the forum and constituted viewpoint discrimination. A nonpublic forum is subject to the tests of reasonableness and viewpoint neutrality. *Cornelius*, 473 U.S. at 803. The reasonableness analysis "focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated." *Brown v. Calif. Dep't of Transp.*, 321 F.3d 1217, 1222 (9th Cir. 2003) (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999)). Viewpoint discrimination "is a form of content discrimination in

which 'the government targets not subject matter, but particular views taken by speakers on a subject.'" *Children of the Rosary*, 154 F.3d at 980 (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995)). The test therefore is whether state control over this apparently nonpublic forum is "reasonable in light of purpose served by the forum" and is "viewpoint neutral."

As to reasonableness, this Court has already recognized Defendants' claim that license plates are Arizona's best method for identifying a vehicle and a vehicle owner. *See Kahn*, 16 Cal.App.4th at 166. Second, Defendants argue that "[t]he Commission's action in denying Plaintiffs' plate application, which resulted in keeping the State of Arizona viewpoint neutral in the Choose Life/Pro-Choice debate, was reasonable." This view is supported by case law. The United States Supreme Court and the Ninth Circuit Court of Appeals have found that the exclusion of partisan groups in a non-partisan arena prevents a state from granting "one side of a debatable public question . . . a monopoly in expressing its views. . . ." *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976); *see Monterey County Democratic Cent. Comm. v. United States Postal Serv.*, 812 F.2d 1194, 1198-1199 (9th Cir. 1987). "[A]voiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum." *Cornelius*, 473 U.S. at 811.

While special plate messages may have some indicia of private expression, Defendants conclude rightly that it has kept Arizona from entering the politically sensitive arena of abortion politics. Granting one side of a political debate the exclusive use of a license plate that is manufactured and issued by Arizona for vehicle identification purposes would pollute the overall purpose of the forum. Thus, Arizona has set forth a scheme that is reasonable in light of the forum's overall purpose.

Plaintiffs argue, however, that Defendants engaged in viewpoint discrimination because the Commission (1) granted the plate requests of 11 different organizations and (2) refused to say why it denied Life Coalition's application. Generally, "a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 811. First, there is nothing in the record to suggest that the Commission favored one view over another. The Commission, for all intents and purposes, has steered clear of the abortion debate. It has neither granted a monopoly nor shown political favoritism to either side of this "debatable public question."

Second, while 11 other requests for a special plate contained a private speech component, most of the messages are non-partisan in nature or messages that the public accepts generally. The "Fraternal

Order of Police," "Professional Fire Fighters," "Legion of Valor," "Stop Running Red Lights," "Conserving Wildlife," and "Service Above Self" are all slogans that cut across political lines and reinforce important public institutions and policies that seek to better mankind without the imposition of political gamesmanship. Furthermore, "[n]one of the 11 organizations whose plate requests were granted had anything to do with the subject matter of Plaintiffs' desired speech or any opposing view." The Commission has remained neutral on the issue and continues to remain neutral on the issue. Thus, the Commission did not engage in viewpoint discrimination.

C. Unbridled Discretion

The Plaintiffs argue that "Arizona's statutory scheme for special organization plates is unconstitutional on its face because it allows the Commission unbridled discretion to restrict private speech." It is unconstitutional "to enable a public official to determine which expressions of view will be permitted and which will not" under a scheme of broad discretionary power. *Cox v. State of Louisiana.*, 379 U.S. 536, 557 (1965). Such limits should provide "'narrowly drawn, reasonable and definite standards' that are 'reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.'" *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1107-1108 (9th Cir. 2003), *cert. denied*, 540 U.S. 1110 (2004) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992)).

Without such clarity, government regulation of speech would create "an impermissible risk of suppression of ideas." *Nationalist Movement*, 505 U.S. at 129.

While it is clearly unconstitutional "to grant an official unfettered discretion" as to the permissibility of expression for particular views, Plaintiffs' alarmist tone is unjustified. There is nothing in the record to suggest that the Commission has engaged in the "sporadic abuse of power" in denying Life Coalition's application. *Id.* at 133. The Commission was merely following the statutory guidelines laid down by the Arizona Legislature pursuant to A.R.S. § 2404(B).

D. Equal Protection

Plaintiffs also argue that the Commission violated the Equal Protection Clause of the United States Constitution. The Supreme Court has stated that "the Equal Protection Clause, not to mention the First Amendment itself . . . may not grant the use of a forum to people whose views, it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). However, "[w]hile distinctions between classes of speech may unconstitutionally burden equal protection rights, the viability of equal protection claims relating to expressive conduct is contingent upon the existence of a public forum."

Monterey County Democratic Cent. Comm., 812 F.2d at 1199-1200 (citing *Perry*, 460 U.S. at 55). "Only when rights of access associated with a public forum are improperly limited may [the Court] . . . conclude that a fundamental right is impinged." *Id.* at 1200. The Plaintiffs, therefore, "can lay no claim to a fundamental right of access here because the applicable forum is nonpublic." *Id.*

In such situations, government regulations of government property relating to speech are upheld if they "rationally further a legitimate state purpose." *Id.* (citing *Perry*, 460 U.S. at 54). Arizona's purpose seeks to avoid the partisan world of abortion politics and to uphold a license plate's overall purpose of vehicle identification. The Commission has not endorsed either side of the debate nor has the Commission granted use of the forum to one side or the other. The status of the Choose Life/Pro-Choice debate remains the same. Thus, Plaintiffs' equal protection claim must fail.

E. Remedies

Finally, Plaintiffs argue that A.R.S. § 28-2404 is unconstitutionally vague, permitting Arizona to exercise otherwise unbridled discretion in the decision-making process for special organization plates. Plaintiffs therefore request that the Court construe the statute to be constitutional by striking the first clause, and defining the words "offensive" and "discriminatory." As support for their argument, Plaintiffs cite to

Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001). In *Lewis*, the Eighth Circuit struck down a Missouri statute prohibiting the issuance of vanity plates that were "contrary to public policy." *Id.* at 1081. The phrase "contrary to public policy" was found to be "so nebulous and malleable [that it could mean] anything presently politically expedient." *Id.*

The Court declines to do as Plaintiffs request. The statute at issue in this case does not pose the same "pervasive threat inherent in its very existence." *Nationalist Movement*, 505 U.S. at 133. This Court is unwilling to rewrite any statute duly passed by the Arizona legislature without any evidence of a contrary legislative intent. In addition, Plaintiffs' constitutional rights were not violated by the Commission's failure to issue a special organization plate that would otherwise support an as-applied challenge to A.R.S. § 2404. An as-applied challenge is where the law is unconstitutional as applied to a party's speech activity, even though the law is capable of valid application to others. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.22 (1984). As the Court's previous analysis has shown, no constitutional violation took place that would require this Court to rule § 28-2404 unconstitutional as applied to Plaintiffs.

F. Conclusion

Plaintiffs' suit fails to show that the constitutional rights of Life Coalition were violated as a

result of the Commission's action denying Life Coalition's application for a special organization plate. Due to the necessity of vehicle identification by state authorities, speech on state-approved, state-issued license plates is governmental in nature and constitutes a nonpublic forum from which access is selective rather than general. Defendants' action was reasonable in light of the purpose served by license plates, that is, the identification of a vehicle and its owner.

Furthermore, Defendants' action did not result in viewpoint discrimination. The Commission sought to avoid the appearance political favoritism in an otherwise nonpublic forum and maintained state neutrality on the issue, giving neither side a leg up in this hotly debated public question. On that basis, Plaintiffs' claims that the Commission engaged in the use of unbridled discretion and abuse of power, as well as the Commission's alleged equal protection violations, must all fail. Since no constitutional violation exists, this Court cannot find A.R.S. § 28-2404 unconstitutional without proof of a contrary legislative intent. Therefore,

IT IS ORDERED that Plaintiffs' Amended Motion for Summary Judgment (doc. #39) is denied.

IT IS FURTHER ORDERED that Defendants' Cross Motion for Summary Judgment (doc. #45) is granted. The Clerk of the Court shall enter judgment for the defendants accordingly.

Dated this 26th day of September, 2005.

/s/ Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge

APPENDIX C

Constitutional and Statutory Provisions

• U.S. Const. amend I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

• Arizona Revised Statutes §§ 28-2404 and 28-2405:

§ 28-2404. Special organization plates; state highway fund account; definitions

A. An organization may submit a request to the department on a form prescribed by the department for a special organization plate. In the request the organization may propose suggested indicia for the special organization plate that are indicative of the organization. If the department determines the organization meets the requirements of an organization as defined in this section, the department shall submit the request for a special organization plate to the license plate commission established by section 28-2405.

B. The commission shall determine and inform the department whether the requested special organization plate is authorized. The commission shall

authorize a special organization plate if the organization meets the following requirements:

1. The primary activity or interest of the organization serves the community, contributes to the welfare of others and is not offensive or discriminatory in its purpose, nature, activity or name.

2. The name of the organization or any part of the organization's purpose does not promote any specific product or brand name that is provided for sale.

3. The purpose of the organization does not promote a specific religion, faith or antireligious belief.

C. If the commission authorizes the special organization plate pursuant to subsection B of this section, section 28-2403 and the following requirements and procedures apply:

1. The department shall inform the organization of the authorization by the commission of the requested special organization plate and the requirements of this subsection.

2. The organization shall collect and hold applications from its members and the required fees for the special organization plates.

3. The organization shall refund all fees to applicants if the department refunds the fees to the organization.

4. The organization shall submit the applications and fees to the department by January 1 of any calendar year.

5. The department shall design and issue the requested special plate within one year after receiving the applications and fees if the department determines that both of the following apply:

(a) The applicants are qualified for the requested special plate.

(b) The monies paid for the plates are available to the state.

D. The determination of the commission of whether to authorize a special organization plate and of the department of whether to issue a special organization plate as required by this section is not subject to the rule making provisions of title 41, chapter 6. The department shall file with the secretary of state a document for publication in the administrative code with the department's rules that names each special organization plate that is authorized and issued pursuant to this section.

E. Monies collected pursuant to this section shall be deposited in a separate account of the state highway fund pending the determination required by subsection C, paragraph 5 of this section. The department shall deposit, pursuant to sections 35-146 and 35-147, the fees received with applications for each special organization plate in the state highway fund account. The department shall use the monies in

the account to provide refunds to an organization if special organization plates are not issued. Monies in the account that are not refunded shall be deposited as required by law.

F. Eight dollars of the fee prescribed in section 28-2402 for original special plates and the renewal of special plates issued under this section is a special plate administration fee and seventeen dollars is an annual donation to the organization. If the fees are not refunded and the special plates are issued pursuant to this section, the department shall retain the special plate administration fees in the state highway fund established by section 28-6991 to cover administration costs and shall transmit the donations as authorized in a written resolution of the organization.

G. For the purposes of this section:

1. "Commission" means the license plate commission established by section 28-2405.

2. "Organization" means an entity that is organized as a nonprofit corporation pursuant to title 10, chapters 24 through 40 and that either:

(a) Certifies to the department that the organization has at least two hundred members.

(b) If the organization has fewer than two hundred members, agrees to pay the production and program costs of the special organization plate as determined by the commission.

28-2405. License plate commission

A. A license plate commission is established. The commission is composed of the following members:

1. Two public members who are appointed by the director of the department of transportation.

2. A person who is appointed by the governor from the governor's office of highway safety and who serves at the pleasure of the governor.

3. The director of the department of public safety or the director's designee.

4. The director of the department of transportation or the director's designee.

5. The director of the office of tourism or the director's designee.

6. The director of the state department of corrections or the director's designee.

B. The director of the department of transportation or the director's designee shall serve as chairman of the commission. The chairman shall preside at commission meetings and coordinate the activities of the commission and staff implementation of commission actions.

C. All official actions of the commission shall be decided by a majority vote of commission members.

D. The commission shall determine the following:

1. The color and design of license plates.

2. The color of special plates to be the same as and the design of special plates to be similar to the license plates, except for special plates issued pursuant to sections 28-2412, 28-2413, 28-2414, 28-2416 through 28-2428, 28-2452, 28-2453, 28-2454 and 28-2455 and article 14 of this chapter.

3. Whether to authorize special organization plates pursuant to section 28-2404.

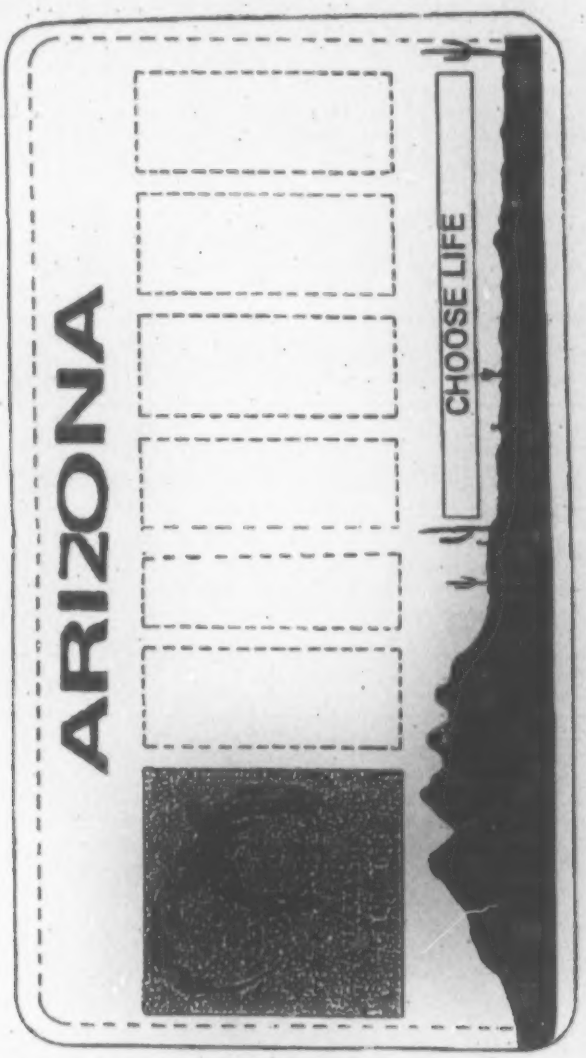
4. The indicia for special organization plates issued pursuant to section 28-2404.

E. The department shall provide the commission with staff and technical assistance as necessary to perform its functions.

F. Commission members are not eligible to receive compensation, but the members who are appointed pursuant to subsection A, paragraphs 1 and 2 of this section are eligible for reimbursement of expenses pursuant to title 38, chapter 4, article 2.

APPENDIX D

Arizona Life Coalition's requested license plate (taken from Exhibit 19 to Stipulated Facts [Dkt. 35]).



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No. 07-1366

IN THE

Supreme Court of the United States

STACEY STANTON; MICHAEL FRIAS; BRIAN LANG; JOHN SPEARMAN; TERRY CONNOR; WILLIAM A. ORDWAY; and LELA STEFFEY, Members of the Arizona License Plate Commission,

Petitioners,

v.

ARIZONA LIFE COALITION, GARY PAISLEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant review when there exists no conflict—but instead unanimity—among all the circuits on the question raised by this case, *viz.*: When the State invites private speakers to present their own messages on a designated area of a license plate, may it then censor those speakers because of the viewpoint of this speech?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Arizona Life Coalition states that it is a non-profit corporation in the State of Arizona. Arizona Life Coalition does not have a parent corporation and is not publicly held.

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INTRODUCTION

Bumper stickers, vanity plates, and specialty plates represent three commonplace ways a vehicle owner can communicate messages. The decision to display such messages is plainly that of the vehicle owner, not the State, and thus is *private* speech. The petition for certiorari in this case relies upon the opposite, highly counterintuitive proposition: that the *government* speaks through the privately chosen and designed message of a vanity or specialty plate. This Court should decline the invitation to review a case founded upon such an implausible proposition.

The Ninth Circuit's unanimous decision below presents an entirely unremarkable conclusion: that government officials may not discriminate against private speakers' viewpoints within a State-created speech forum to which those speakers have statutorily-authorized access. The Petitioners, though now acknowledging their viewpoint-based censorship, urge a categorical immunity from First Amendment restraints for State officials administering a speech forum involving license plates. This unprecedented proposal runs contrary to every federal court case to consider the general issue of license plate speech, as well as this Court's settled speech-forum analysis.

Moreover, the circuit conflict Petitioners assert to have resulted from the decision below is erroneously premised on a comparison of apples and oranges: the different case conclusions on whether speech was private resulted because one case involved speech of a State legislature, and the other

of a private community group. Yet Petitioners simplistically identify the difference in case outcome as indicative of a circuit conflict—never countenancing the plain reality that different facts yield different results under the same legal standard. There is no circuit conflict on the question raised by Petitioners, and no reason for this Court to grant certiorari review.

STATEMENT OF THE CASE

I. Material Facts

Arizona law requires that qualifying non-profit organizations upon application be allowed to obtain a unique license plate that carries the organization's name, logo, and slogan. *See* A.R.S. § 28-2404. Respondent Arizona Life Coalition complied with all statutory criteria in submitting its application for such a plate. But Petitioners, the members of the Arizona License Plate Commission, denied the application because of the viewpoint communicated by Life Coalition's name, logo, and slogan on its plate design. The governing statutes do not authorize the Commission to reject proposed plates on the basis of the message they bear. *Id.*

A. License Plates in Arizona

There are two general categories of motor vehicle license plates in Arizona. First, standard plates bear a random alpha-numeric identifier, and are the default choice for Arizona motorists. *See* A.R.S. § 28-2351(B). There is no fee for standard license plates. *Id.* at § 28-2351(A). Second, "special plates" are license plates that differ in some regard

from the standard design. *See* A.R.S. § 28-2401(2). Unlike standard plates, motorists who desire special plates must pay an additional fee. *See* A.R.S. § 28-2402.

There are three types of special plates. First, a "personalized" special plate bears an alpha/numeric identifier that has been chosen by the motorist. A.R.S. § 28-2406. Second, there are plates that have been individually authorized by the legislature through the normal legislative process. *See, e.g.*, A.R.S. § 28-2417 (authorizing child abuse prevention special plates); § 28-2422 (authorizing spaying and neutering of animals special plates). Third, "special organization plates" are available through an administrative process that involves the Arizona Department of Transportation ("Department") and the Arizona License Plate Commission ("Commissioners" or "Petitioners"). *See generally* A.R.S. § 28-2404. The legislature has no role in designing the content of a special organization plate. A portion of the proceeds from special organization plates go to the sponsoring organization. *Id.* at § 2404(F). Special organization plates are the subject of this lawsuit.

B. The Special Organization License Plate Program

Arizona law sets forth an administrative procedure for select nonprofit organizations to obtain a special organization license plate. *See generally* A.R.S. § 28-2404. Organizations must complete a form prescribed by the Department. A.R.S. § 28-2404(A). The form includes a "template" for organizations to submit their requested plate

designs. Stip. Facts (Dkt. 35) Ex. 19. The top of the template reads, "Please use plate template below to submit your design." *Id.* Instructions in the left margin of the template invite the applicant to "[u]se this block for your logo." *Id.* And instructions at the bottom, right corner of the template instruct: "Use this space for your organization name or slogan. Maximum number of 20 characters." *Id.*[1]

Once a nonprofit organization has submitted its request to the Department, the Department determines if the organization meets the requirements of A.R.S. § 28-2404(G)(2). The organization must be a registered nonprofit organization in Arizona and it must certify either that it has at least 200 members, or that it agrees to pay the production and program costs for the special organization plates. A.R.S. § 28-2404(C)(5). If the Department determines that the organization meets these requirements, it forwards the request to the Commission. *Id.* at 28-2404(A). The Commissioners are then charged with the exclusively ministerial determination of whether the organization qualifies for issuance of a special organization plate. The standards for this limited determination are set forth in A.R.S. § 28-2404(B):

> The commission shall determine and inform the department whether the requested special organization plate is authorized. The

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[1] The Commissioners have excised all the foregoing quoted text from their reproduction of this portion of the exhibit, and have attached this as Appendix D to their brief. Life Coalition has attached hereto as an Appendix the exhibit portion as it actually appears, without these critical redactions.

> commission *shall authorize* a special organization plate if the organization meets the following requirements:
>
> 1. The primary activity or interest of the organization serves the community, contributes to the welfare of others and is not offensive or discriminatory in its purpose, nature, activity or name.
>
> 2. The name of the organization or any part of the organization's purpose does not promote any specific product or brand name that is provided for sale.
>
> 3. The purpose of the organization does not promote a specific religion, faith or antireligious belief.

(Emphasis added.)

C. Life Coalition's Application for a Special Organization Plate

Life Coalition is an Arizona non-profit organization, comprising both organizational and individual members. Stip. Facts (Dkt. 35) at 2, ¶ 1. Life Coalition exists to provide compassionate care to women who are considering abortion, or who are affected by abortion. *Id.* at 8, ¶ 25. The organization submitted an application to the Department that would display its official logo (a small graphic of two children's faces) and its motto "Choose Life." *Id.* at ¶ 22. The Department confirmed that Life Coalition was a qualified organization under A.R.S. § 28-2404(G)(2) and forwarded the request to the Commission. *Id.* at ¶ 24.

The Commissioners first considered Life Coalition's application at their August, 28, 2002 meeting (*id.* at 11, ¶ 32), and expressed reservations about Life Coalition's motto on the plate, including concern that other organizations may be motivated to seek plates with differing viewpoints, and that Life Coalition's plate could be perceived as expressing State approval of its message. *Id.* at 11, ¶¶ 36, 38. Life Coalition's representative offered to immediately amend the application to include also the organization's name, but the Commission tabled Life Coalition's plate request pending additional information and to seek legal advice. *Id.* at 11-12, ¶¶ 34, 38-39. On September 27, 2002, Life Coalition submitted to the Department a revised application containing Life Coalition's name as well as its logo and slogan in the plate design.

Fully one year later, on August 28, 2003, the Commission finally met again and considered Life Coalition's revised plate application. *Id.* at 13, ¶ 44. At this time the Commissioners solicited information from Life Coalition's representative confirming that the organization qualifies for a specialty plate under the governing statute. *Id.* at 15-16, ¶¶ 55-63. The Commissioners thereupon withdrew for discussion with counsel in executive session, after which they returned and formally denied Life Coalition's application. *Id.* at 16-18, ¶¶ 65, 70-80. The Chairwoman of the Commission refused to offer an explanation for the denial, and disallowed questions or further discussion of the matter. *Id.* at 18, ¶¶ 83-84.

II. Proceedings Below

On September 2, 2003, Life Coalition filed suit in the United States District Court for the District of Arizona against the Commission, alleging that the Commission violated its First Amendment and equal-protection rights by denying its application. Cmplt. (Dkt. 1) at 14. The parties filed Cross Motions for Summary Judgment based on stipulated facts. Pls. SJ. Mtn. (Dkt. 34), Stip. Facts (Dkt. 35), Pls. Amdt. SJ. Mtn. (Dkt. 39), Dfs. Crs. SJ. Mtn. (Dkt. 45). The district court denied Life Coalition's motion for Summary Judgment and granted the Commission's motion for Summary Judgment. Pet. App. B (Dkt. 54).

Addressing the question of who is speaking on special organization plates, the district court utilized the four-factor analysis first applied to license plate speech by the Fourth Circuit in *Sons of Confederate Veterans, Inc. v. Comm'r of Virginia Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002). Pet. App. 5b-13b. The district court concluded that the speech on special organization license plates was "governmental in nature" (*id.* at 24b), though it nonetheless went on to analyze the case through the lens of private speech forum analysis. *Id.* at 13b-20b. The district court found that the special organization program was a nonpublic forum, and that the Commission's ban on Life Coalition's speech was reasonable and viewpoint neutral. *Id.* at 17b-20b.

On appeal, the Ninth Circuit reversed. *Ariz. Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008), Pet. App. 1a. The Ninth Circuit held that the

organization's identifiers on special organization plates are private speech, not the speech of the government. *Id.* at 21a. The court rested this conclusion on both the four-factor test formulated by the circuit courts of appeal, and this Court's decision in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). The court noted that the Sixth Circuit in *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir.), *cert. denied*, 126 S.Ct. 2972 (2006) relied on *Johanns* to the exclusion of the four-factor test (*id.* at 11a), but the Ninth Circuit determined that these two tests contained similar considerations, and the court adopted both standards for its analysis of the case. *Id.* at 14a.

In reaching its private speech determination, the court reasoned that the specialty plate program opened a forum to philanthropic organizations for presentation of their logo and motto, and allowed "exercise of First Amendment rights in the hopes of raising money to support their cause." *Id.* at 16a. The court next emphasized that the idea and message for the Choose Life plate originated with Life Coalition—not the legislature. The legislature regulated only the category of eligible participants, not the speech content that may be presented on the plates. *Id.* at 17a-18a. The court additionally found that the plate messages are associated with the driver or owner of the vehicle (*id.* at 18a-20a) and that such messages are controlled by the participating organization and the private persons who voluntarily decide to display the message. *Id.* at 21a.

After determining that Life Coalition's "Choose Life" message was private speech, the Ninth Circuit went on to find that the special organization plate program was a "limited public forum." *Id.* at 28a. The court found that forum was open to Life Coalition's speech, and the Commissioners' actions impermissibly targeted Life Coalition's viewpoint. *Id.* at 32a. The Ninth Circuit also found that the restriction on Life Coalition's speech was unreasonable because Life Coalition met all statutory requirements to obtain its plate, its speech fit within the purpose for the forum, and the Commissioners ignored the statutory mandate requiring authorization of the organizational plate. *Id.* at 33a.

REASONS FOR DENYING THE WRIT

The Commissioners seek review on the implausible ground that the Ninth Circuit's decision identifying Life Coalition's plate design as private speech creates a conflict with the Sixth Circuit's *Bredesen* decision. Such a conflict does not exist, for the *Bredesen* case rested upon a crucially different set of facts. A message designed by the State legislature (as in *Bredesen*) is categorically different than one generated by a private party like Life Coalition—and a different classification of the nature of each does not entail a conflict in the legal standard applied.

The Commissioners, moreover, propose a novel, unprecedented legal test that even *Bredesen* does not endorse. Specifically, the Commissioners propose a rule that all speech found on license plates is *per se* government speech. Under this theory,

government officials' viewpoint-based exclusions of private speakers from license plate speech forums (whether vanity plates or organizational plates) would be immune from First Amendment scrutiny, in every instance. No court has adopted such a radical departure from forum analysis standards, and the Commissioners present this Court no legitimate reason to do so here.

I. THERE IS NO CONFLICT BETWEEN THE NINTH AND SIXTH CIRCUITS.

The Commissioners ask the Court "to settle a dispute among the federal courts about whether the States' specialty license plates constitute government speech." Pet. 2. But the differing case outcomes the Commissioners identify resulted from significant factual differences, not application of inconsistent legal principles.

The Commissioners urge that the Ninth Circuit, by identifying Life Coalition's plate design as private speech, ruled "in direct conflict with the Sixth Circuit in *Bredesen*, 441 F.3d at 375 (message on the face of Tennessee specialty license plates is government speech)." Pet. 8. An examination of *Bredesen* reveals this assertion to be false.[2]

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[2] Petitioners claim that the Ninth Circuit "acknowledged" that the Sixth Circuit's decision in *Bredesen* presented the opposite conclusion of its private speech determination, "'on nearly identical facts.'" Pet. 6, 7 (quoting the Ninth Circuit's opinion, Pet. App. 11a). The truth is that the Ninth Circuit nowhere acknowledged a conflict with the *Bredesen* decision. The sentence fragment ("on nearly identical facts") that the Commissioners extract from its context in the opinion was

In *Bredesen*, the Sixth Circuit evaluated whether a "Choose Life" message on a Tennessee license plate constituted private speech or government speech. The court noted that the plate's message had been "government-crafted" and specifically chosen and controlled by the Tennessee legislature itself, which had "spelled out in the statute that these plates would bear the words 'Choose Life.'" 441 F.3d at 376. The court offered that "[s]o long as Tennessee sets the overall message and approves its details, the message must be attributed to Tennessee[.]" *Id.* at 377. The subtext of the court's analysis in *Bredesen* is that if the message had originated with or been controlled by a private party—as in the present case—the speech on the license plate would have been private.

Life Coalition's name, logo, and slogan would appear on an organizational plate which it had designed and for which it had applied in response to the State's categorical invitation to nonprofit community groups. The Ninth Circuit's unexceptional finding that such a plate design is private speech is thus entirely consistent with *Bredesen*. Indeed, there is no reason to think that the Sixth Circuit could have reached a different result in this case than did the Ninth Circuit. While the court in *Bredesen* emphasized that the Tennessee legislature had been the source of the message in that case so as to conclude the speech was that of the government, the Ninth Circuit conversely emphasized the Legislature's *non-*

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presented by the court in comparing Fourth Circuit and Sixth Circuit cases, not (as the Commissioners assert) the Sixth Circuit's *Bredesen* decision and this case. *See* Pet. App. 11a.

involvement to identify the private classification of the speech: "the statutory requirements address who may speak, not what they may say." Pet. App. 17a. "[T]he idea of a 'Choose Life' license plate originated with Life Coalition. While the Commission determined whether Life Coalition met the statutory guidelines for gaining access to the license plate forum, Life Coalition determined the substantive content of their [sic] message." *Id.* at 18a.

Thus, the Ninth Circuit's decision in this case was consistent with *Bredesen* (and all other extant federal caselaw) on the material point. While *Bredesen* is in conflict with the Fourth Circuit's decision in *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786 (4th Cir. 2004), that dispute is limited to the classification of *legislatively*-designed license plate messages.[3] The present case involves no such scenario. Rather, the relevant observation is that both *Rose* and *Bredesen*, notwithstanding the difference between them, are each consistent with the decision below regarding the private speech of Life Coalition. The Ninth Circuit's ruling is an uncontroversial application of settled First Amendment standards.

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[3] This Court has denied review of that conflict. *American Civil Liberties Union of Tennessee v. Bredesen*, 548 U.S. 906, 126 S.Ct. 2972 (2006).

II. THE COMMISSIONERS HAVE NOT DEMONSTRATED ERROR IN THE CONSENSUS RULE APPLIED BY THE NINTH CIRCUIT, NOR SHOWN THE MERIT OF THE UNPRECEDENTED ALTERNATIVE RULE THEY OFFER.

While alleging a conflict between the Sixth Circuit in *Bredesen* and the Ninth Circuit here, the Commissioners ultimately repudiate the legal analysis in both cases. The Commissioners assert that this Court's *Johanns* test (utilized by both the Sixth Circuit and Ninth Circuit) is limited to its facts and is of no utility in the license plate context. Pet. 14-15. Likewise, they reject the four-factor test (utilized by the Ninth Circuit below) for, they say, that test "*seems at least partially* responsible for the Ninth Circuit's failure to perceive" the supposed government voice in specialty license plates (Pet. 16, emphasis added)—hardly a rousing argument for the necessity of this Court's corrective intervention. So also do the Commissioners implicitly reject the less formulaic, presumptive-private analysis of the Second Circuit (*Perry v. McDonald*, 280 F.3d 159, 166-70 (2d Cir. 2001)), Eighth Circuit (*Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001)), and Eleventh Circuit (*Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003)).

In place of such reasoned jurisprudence, the Commissioners propose a novel standard that flatly denies the applicability of First Amendment restraints to specialty license plate cases. On this approach, all specialty plate forums would be open to unbridled discretion and viewpoint discrimination by

government officials for the reason that any speech on a license plate is, *ipso facto*, government speech. This result is achieved through the Commissioners' newly-introduced "typical viewer" standard, whereby the owner and editor of the message is irrelevant, and the unreasoned viewer's presumptions are determinative. *See* Pet. 14, 17, 18.

This is nothing like the "reasonable observer" construct in Establishment Clause analysis from which the Commissioners apparently drew inspiration. *See* Pet. 17. Instead of the objective, fully informed observer appearing in Establishment Clause cases, *see, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002), the Commissioners' "typical viewer" is necessarily uninformed, and steadfastly so. The Commissioners' proposed "viewer" believes that all speech on license plates is government speech, in every circumstance.

This is manifestly incorrect, if not simply absurd. No one but a genuinely obtuse observer would seriously contend that an "ILUVSUE" vanity plate or a "Scottish Rite Mason" organizational plate represents the speech of the government. But the Commissioners nonetheless emphatically insist that all speech appearing on a license plate is "quintessentially," "clearly," "unequivocally," "indelibly," "inevitably," and "irretrievably" identified with the government. Pet. 14, 16. No federal court agrees.

With *Bredesen* easily harmonized with this case, every other circuit that has evaluated First Amendment challenges relating to messages on custom license plates has treated that circumstance

as implicating private speech and thus subject to the constraints of the First Amendment. *See Children First Foundation, Inc. v. Martinez*, 169 Fed. Appx. 637, 639 (2d Cir. 2006) (summary order) ("custom license plates involve, at a minimum, some private speech"; First Amendment restraints apply); *Planned Parenthood of South Carolina v. Rose*, 361 F.3d at 798 (plurality) (specialty license plates a limited forum for expression); *Women's Emergency Network v. Bush*, 323 F.3d at 946-47 and n.9 (11th Cir. 2003) (private, not government speech on plate; First Amendment standards applied); *Sons of Confederate Veterans v. Commissioner of the Virginia Dept. of Motor Vehicles*, 288 F.3d at 621 (4th Cir. 2002) (special plates constitute private speech); *Perry v. McDonald*, 280 F.3d at 166 (2d Cir. 2001) (vanity plate speech "private individuals' speech on government-owned property"); *Lewis v. Wilson*, 253 F.3d at 1079 (8th Cir. 2001) (vanity plate messages private speech, subject to First Amendment standards).[4]

The Commissioners are petitioning this Court to review a case that does not implicate a circuit conflict, in order to overturn the unbroken consensus of courts that the First Amendment applies to license plate speech forums. The Commissioners proposed new rule is neither sensible nor justifiable. This Court should decline review.

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[4] District courts have reached the same conclusion. *See, e.g., Choose Life Illinois, Inc. v. White*, 2007 WL 178455, *7 (N.D. Ill. 2007) (choose life message on license plate is private speech); *Women's Resource Network v. Gourley*, 305 F.Supp.2d 1145 (E.D.CA. 2004) (First Amendment applied to custom plate program).

III. THIS CASE IS NOT A SUITABLE VEHICLE FOR REVIEW.

Beyond the insurmountable substantive demerit of the Commissioners' application, there are a number of structural considerations that suggest this case is unsuitable for review.

To begin with, the Commissioners have violated State law in excluding Life Coalition from the specialty plate forum. As the Ninth Circuit explained:

> The Commission does not dispute that Life Coalition has met each of the statutory requirements. ... When an organization meets the requirements, the statute provides that '[t]he [C]omission *shall* authorize a special organization plate.' Ariz.Rev.Stat. s 28-2404(B) (emphasis added). By denying Life Coalition's application, although the organization and its message complied with the limited public forum's purpose as it is currently defined under Arizona law, the Commission ignored its statutory mandate and acted unreasonably[.]

Pet. App. 33a. It is incongruous, then, for the Commissioners to argue that excluding Life Coalition from the plate forum furthers the State's interest.

Similarly, there is otherwise no State interest at risk as a result of this case that would call for this Court's review. While the Commissioners sensationally offer that the Ninth Circuit has

transmuted the First Amendment into a "sword, giving citizens the power to force an unwilling government to convey their messages," Pet. 21, and otherwise has "failed to give the State ... legitimate control" over plate messages, Pet. 16, these statements woefully mischaracterize the significance of the court's ruling. It was the State that created this forum and invited groups like Life Coalition to speak within it. But for that statutory invitation, First Amendment saber rattling would be in vain. But once Arizona opened the forum, the officials implementing the program are forbidden by the First Amendment to censor otherwise qualified forum entrants because of their viewpoint.

Finally, there is no urgency calling for review of this case. There are (as the Commissioners point out, Pet. 12 n.2) several custom license plate cases working their way through the lower courts. Some involve organizations that have applied for approval of a "Choose Life" plate of that organization's own design, submitted as part of a State's specialty plate forum program. *Roach v. Vincent*, No. 08-1429, Eighth Circuit; *Choose Life Illinois v. White*, No. 07-1349, Seventh Circuit; *Children First Foundation, Inc. v. Legreide*, Civ. Action No. 04-2137 (D.N.J.); *Children First Foundation, Inc. v. Martinez*, Civ. Action No. 04-CV-927 (N.D.N.Y.). If a court of appeals were to decide such a case in a fashion that departs from the current circuit consensus reflected in the Ninth Circuit's decision, a genuine circuit conflict—and a legitimate review opportunity—would then arise.

IV. THIS COURT SHOULD NOT HOLD THIS CASE PENDING DETERMINATION OF THE UNRELATED *SUMMUM* CASE.

This Court should decline the Commissioners' request that it hold this petition pending the disposition of *Pleasant Grove v. Summum*, No. 07-665, *cert. granted* March 31, 2008. The *Summum* case deals with the control and display of government-owned monuments on public land, and a private party's attempt to compel government receipt and display of an unsolicited monument donated to it. Here, by contrast, the speech of select nonprofit organizations has been affirmatively invited by State legislative enactment. The Arizona special organization license plate program is designed for private organizations to speak about themselves and to raise money for their efforts. The application form for the plate program instructs applicants that the plate is for "your design," "your logo," and "your organization name or slogan." Stip. Facts (Dkt. 35) Ex. 19; *see* Resp. App. And the Commission is required by law to approve a special organization plate for every organization that applies and meets certain criteria. *See* A.R.S. § 28-2404(B) ("The commission shall authorize a special organization plate if the organization meets the following requirements. . . .").

The circumstances confronting the Court in *Summum* are far-removed from those presented in this case, and only the most attenuated comparison may be made, on a level of generality far too broad to call for holding this case pending the review of *Summum*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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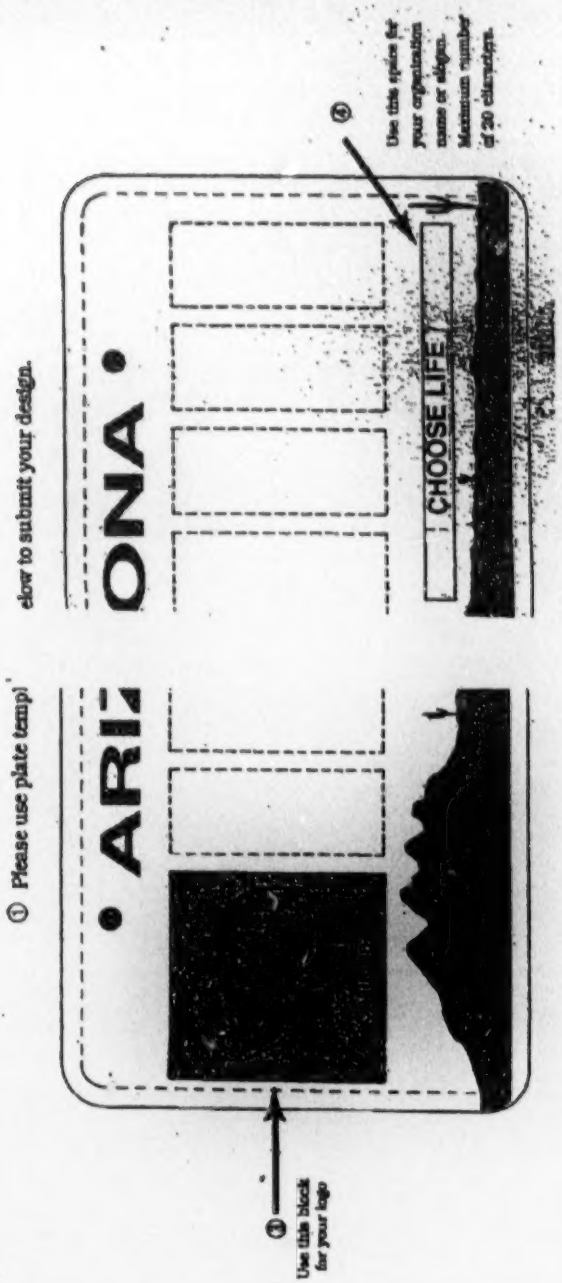
APPENDIX

APPENDIX

Plate application form, as found in pages 2 and 3 of Exhibit 19 to Stipulated Facts (Dkt. 35).



No. 07-1366

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In The
Supreme Court of the United States

STACEY STANTON; MICHAEL FRIAS; BRIAN LANG; JOHN SPEARMAN; TERRY CONNOR; WILLIAM A. ORDWAY; and LELA STEFFEY, Members of the Arizona License Plate Commission,

Petitioners,

vs.

ARIZONA LIFE COALITION; GARY PAISLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err in holding – in conflict with the Sixth Circuit – that specialty license plates constitute private speech, not government speech, and that the First Amendment therefore gave the Respondents the right to require Arizona to issue a license plate with a message that Arizona does not wish to convey?

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ARGUMENT

Life Coalition gives no persuasive reason for the Court not to grant certiorari. Its defense of the Ninth Circuit's decision is based on an uncritical acceptance of the very test that the Petition asks this Court to review. Its assertion that Arizona's "Choose Life" plate, if issued, will be materially different from Tennessee's "Choose Life" plate suffers the same defect: an automatic acceptance of the questionable analysis and results of applying that test. Asserting that the law in this area is settled, Life Coalition forgets that this Court has not yet either tested the four-factors test or addressed the First Amendment implications of State-issued specialty license plates.

I. The Ninth Circuit's Decision Conflicts with the Sixth Circuit's, and the Ninth Circuit Erred in Concluding that Government Speech Is Not Implicated Here.

Contrary to Life Coalition's assertion, the Ninth Circuit's holding that an Arizona-issued "Choose Life" plate *would not* implicate government speech directly conflicts with the Sixth Circuit's holding that Tennessee's "Choose Life" plate *does* implicate government speech. *Compare Ariz. Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *with Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). Life Coalition asserts that there is no real conflict because they arose from different background facts. (Response at 9.) Life Coalition thereby ignores the reality that both plates convey the same message,

regardless of the manner in which each plate came about. It also blindly accepts the four-factors test, failing to recognize that if a single test could lead to two such diametrically opposed conclusions, it raises serious questions about the logic and efficacy of that test.

Contrary to Life Coalition's assertion, *Arizona Life Coalition* and *Bredesen* do conflict. While it is true that the background facts leading to the issuance of the plates are different in the two cases, the plates – and the message that they convey – are essentially identical. That different programs and different facts led to the creation of these nearly identical license plates does not change the message that they convey. That the Tennessee Legislature created a Tennessee license plate communicates no more a government message to "choose life" than would a nearly identical Arizona plate just because the idea for the latter originated with a private group. The difference between the two cases is that Tennessee is intentionally stating that message and the Ninth Circuit is forcing Arizona to do so. But the average viewer will not know that history and will receive the exact same message from both. That is the weakness of the four-factors test, or at least the Ninth Circuit's application of it here.

A few basic facts demonstrate the frailty of Life Coalition's argument and the illogical result of the Ninth Circuit's application of the four-factors test here, which led it to conclude that a government-issued license plate did not convey a government message.

• One. Governments issue license plates: they manufacture them and distribute them to be attached to automobiles. (In this case, the government even *owns* the plate.)

• Two. People who view license plates know that governments issue license plates.

These two facts lead inexorably to fact three.

• Three. A government-issued license plate conveys a government message to the viewer.

This cannot be helped: the viewer, knowing that the plate is government-issued, cannot help but get the impression that the government is speaking the message contained on the plate, especially the message on the background, as opposed to the changeable identification numbers and letters. New Hampshire plates exhort viewers to "Live Free or Die." New Mexico plates tell viewers that New Mexico is the "Land of Enchantment." Idaho plates tell them that that state has "Famous Potatoes." Utah plates urge people to "Ski Utah." Standard Arizona plates tell viewers that Arizona is the "Grand Canyon State."

If the Ninth Circuit's decision is allowed to stand, some Arizona plates will tell the viewers that Arizona is urging them to "choose life." At the very least, the viewer cannot help but infer that the government is endorsing that message, which is the same thing. Thus, a license plate inherently involves government speech. There might also be elements of private speech involved in the specialty license plate. *See*

Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 793, 800, 801 (4th Cir. 2004) (recognizing that specialty license plates involve a hybrid of government speech and private speech) *reh'g & reh'g en banc denied*, 373 F.3d 580 (4th Cir. 2004); Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. Davis Law Rev. 1317, 1343 (2004) (specialty license plates are the "state's own speech, informed in part by input from private speakers"). But the Ninth Circuit's failure to recognize the government speech inherent in the specialty license plate at issue here caused it to improperly discount Arizona's interest in controlling its own communications.

Life Coalition also argues that the average viewer is inconsequential because he or she is not an *informed* viewer, not having applied the four-factors test to the license plate to determine the genesis of the plate. (Response at 14.) In essence, Life Coalition is arguing that a second message will make the first message disappear. This argument fails for several interconnected reasons.

First, the argument ignores reality. It is unreasonable to expect that any significant number of viewers would take the time and make the effort to research the origins of the plate to determine whether the government originated the text rather than a private individual or group. Fewer still would have the wherewithal to do so: who, other than lawyers with extra time on their hands, would even think to

do such a thing, let alone know how to do it? The so-called "informed" viewer is not a realistic proposition.

Second, and more fundamentally, the argument's premise is faulty. The research that Life Coalition suggests that the viewer should undertake, if successful, would result only in communicating an additional message to the viewer: the possible initial origins of the plate's message. It *might* make this researcher rethink his or her opinion on whether the State advocates the plate's message. But this second message would not change the communication that already occurred when the person viewed the plate in the first place. And even if this researcher discovered that some private person or organization initiated the suggestion for the message, the fact remains that the message is being broadcast on a state-issued and state-owned license plate that is intimately associated with the State and has the State's name emblazoned across its top. That implies an endorsement, and that is forcing the State to speak a message that it perhaps would rather not.

The vanity license plate that Life Coalition hypothesizes to illustrate its argument in fact demonstrates the opposite point. Life Coalition argues that no reasonable view could seriously believe that "ILUVSUE" on a vanity plate is the government's message. (Response at 14.) This argument obstinately refuses to acknowledge that merely by issuing the plate, the government has endorsed the message – has given it the government's imprimatur. By issuing the plate, it is in effect saying: "This person loves Sue,

and the State approves." If, instead of a message of love for an individual, the personalized plate carried, for example, a message of hatred against a racial or ethnic group, the same imprimatur would adhere. Most viewers would probably correctly surmise that the car's owner, not the State, was the source of this odious message. But the State has still issued the plate and has its name closely associated with it. Those same viewers would therefore wonder why the State granted the plate to that owner, recognizing that allowing the plate is an apparent endorsement of the sentiment. The message that viewers would get from the plate is that the State is saying, "This person hates that group, and the State approves." Even if the State does not, in fact, believe it is okay to proclaim that hatred, the opposite message is inevitably broadcast by the fact that the message appears on the State's license plate. And that message would be perceived by most viewers, including those who are not genuinely obtuse.

Life Coalition's argument also fails because its hypothetical vanity plate differs markedly from the specialty license plate at issue here. Messages in the changeable alpha-numeric portion of vanity plates are much more closely associated with the car's owner because each is unique. Here, by contrast, the message will be conveyed in the background portion of the plate, which is not only far more uniform – it will appear on hundreds or thousands of Arizona plates – but is where States put their own messages, like "Live Free or Die."

All of this demonstrates – contrary to Life Coalition's argument (Response at 13-15) – that the Ninth Circuit did indeed err in holding that the specialty license plate at issue here does not constitute government speech. The license plate – any government-issued license plate – cannot help but communicate a government message. That being so, any test that reaches a contrary result is at least inherently suspect and probably useless.

The Court should review Life Coalition's proposed license plate, which will be on the roads soon if the Ninth Circuit's decision is allowed to stand. (Facsimiles of Life Coalition's proposed plate are found in both the Petition's Appendix at 1d, and the Response's Appendix at 1a.) It cannot reasonably be doubted that the general viewer looking at the license plate would conclude that Arizona is endorsing the Life Coalition and is urging people to "choose life." *See Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 541 n.4 (Or. App. 2000) (en banc) (Wollheim, J., concurring) ("The reason why an individual wants a vanity license plate is that the license plate bears the imprimatur of the state."), *aff'd*, 72 P.3d 628 (Or. 2003). The Commissioners pointed out that this evident endorsement is exactly why Life Coalition wants this license plate in the first place. (Petition at 18.) Life Coalition does not even bother to deny it. An endorsement is a communication, and a State's endorsement is government speech. The Ninth Circuit erred in concluding otherwise, and its conclusion conflicts with the Sixth Circuit's holding.

II. This Case Presents a Suitable Vehicle for This Court to Review the First Amendment Question Presented.

This case does appropriately present a question of federal constitutional law. Contrary to Life Coalition's suggestion (Response at 16), the Ninth Circuit did not rest its decision on state law. The court did interpret the Arizona statutes in reaching its conclusion. (App. A at 25a.) But its decision is based on the First Amendment. (App. A at 34a ["[W]e conclude that the Commission acted in violation of the First Amendment."].)

Life Coalition's argument that there is no state interest at stake here because the State invited organizations to apply for plates (Response at 16-17), falls of its own weight. The suggestion that the State of Arizona has no interest in controlling the messages disseminated on its license plates is simply wrong. All States have a legitimate interest in controlling the messages that they convey or are perceived as conveying. It is no different for Arizona and its license plates. At the least, that is a question that this Petition would present for this Court to decide.

Life Coalition's suggestion that the Court ought to wait for another license-plate case before deciding the important issues presented here is imprudent. With the vagaries of litigation, it cannot be safely assumed that those cases will ever reach this Court and present the same issue. (Indeed, in one of those cases, the district court has recently granted summary

judgment to the defendants based on qualified-immunity grounds, holding that the law was not previously clearly established. *Children First Foundation v. Legreide*, No. 04-2137 (D. N.J., mem. dec. issued June 16, 2008)). Meanwhile, the government-speech issue is presented in this case, which is already before the Court. This case presents an opportunity to resolve the government-speech issue for those cases working their way through the courts. Life Coalition's mere desire to get the specialty license plate with its logo and motto *before* this Court addresses the important First Amendment issues that are presented here is not a valid concern.

III. If the Court Does Not Immediately Grant Certiorari, It Should Hold the Case Pending Its Decision in *Summum*.

Life Coalition offers no good reason for the Court not to hold this case pending its ruling in *City of Pleasant Grove v. Summum*, No. 07-665, *cert. granted* Mar. 31, 2008. Life Coalition is correct in asserting that there are differences between the cases: this one involves an automobile specialty license plate while *Summum* involves stone monuments displayed in a public park. (Response at 18.) But that is an unimportant distinction: this case, just like *Summum*, requires an analysis of the government-speech doctrine. Because the Court's eventual holding in *Summum* could have a significant impact on this case, it would be imprudent to deny certiorari outright. If the

Court does not grant certiorari right away, it should at least hold the case pending *Summum*.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

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